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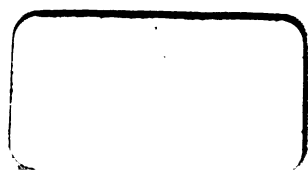
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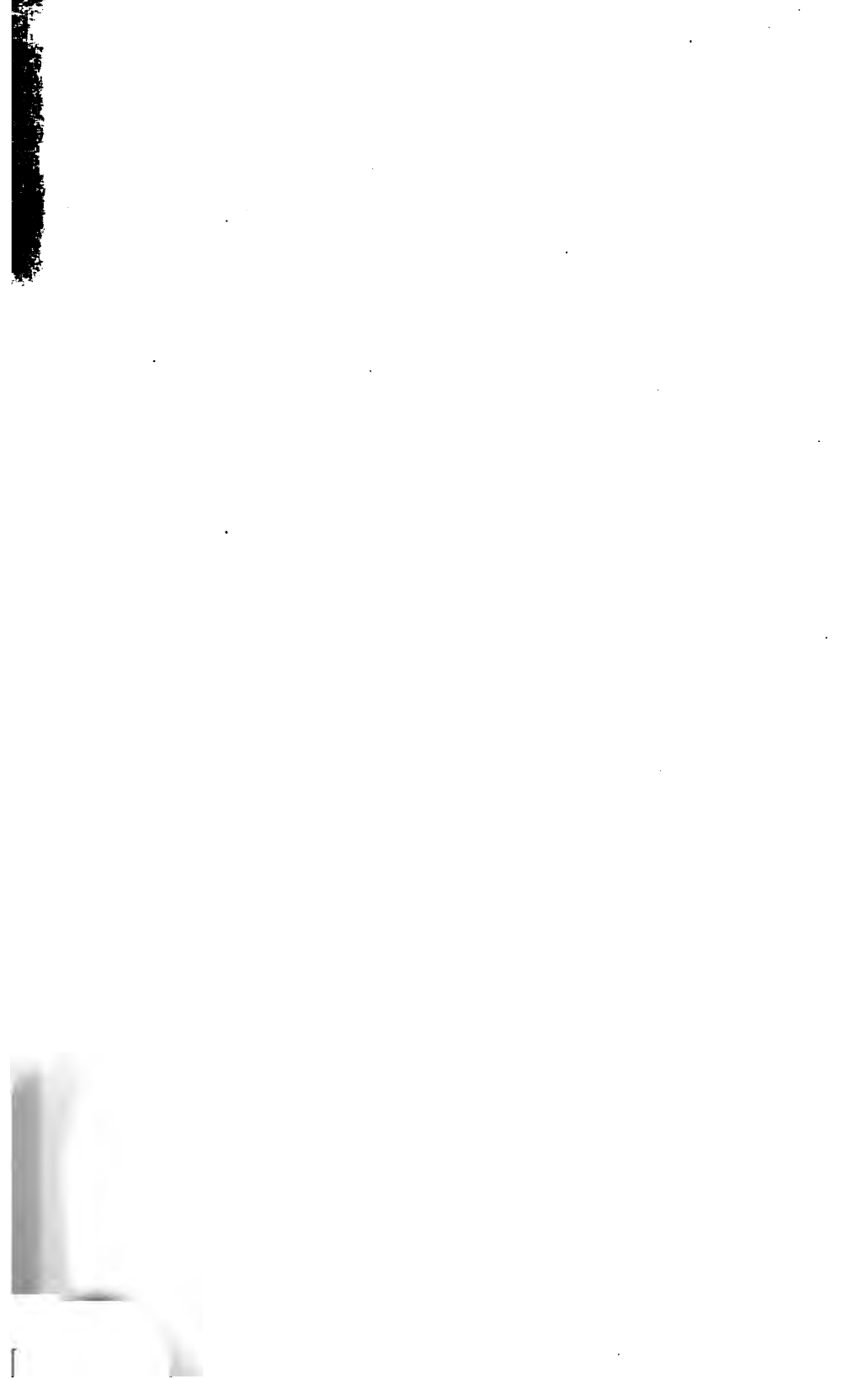
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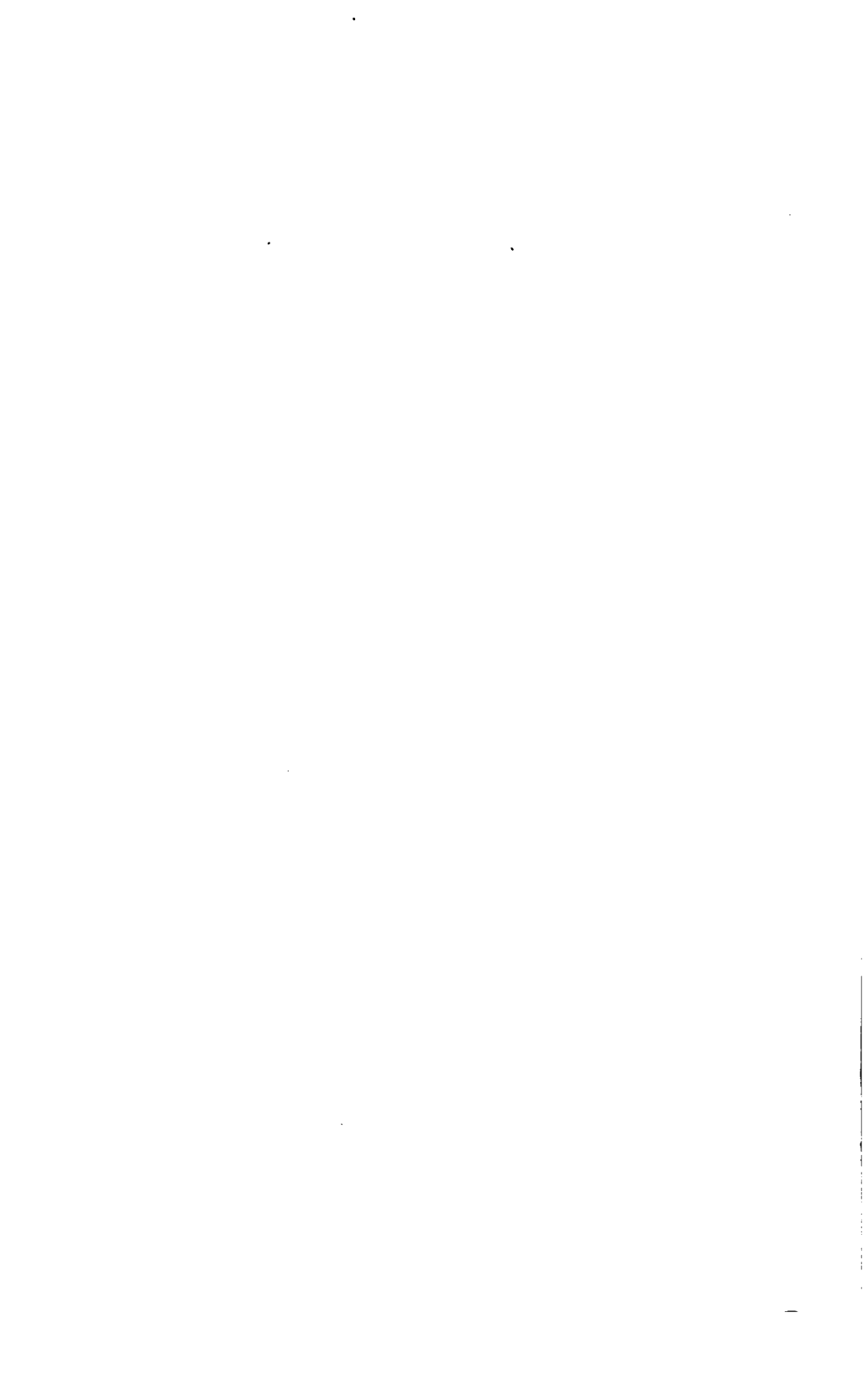
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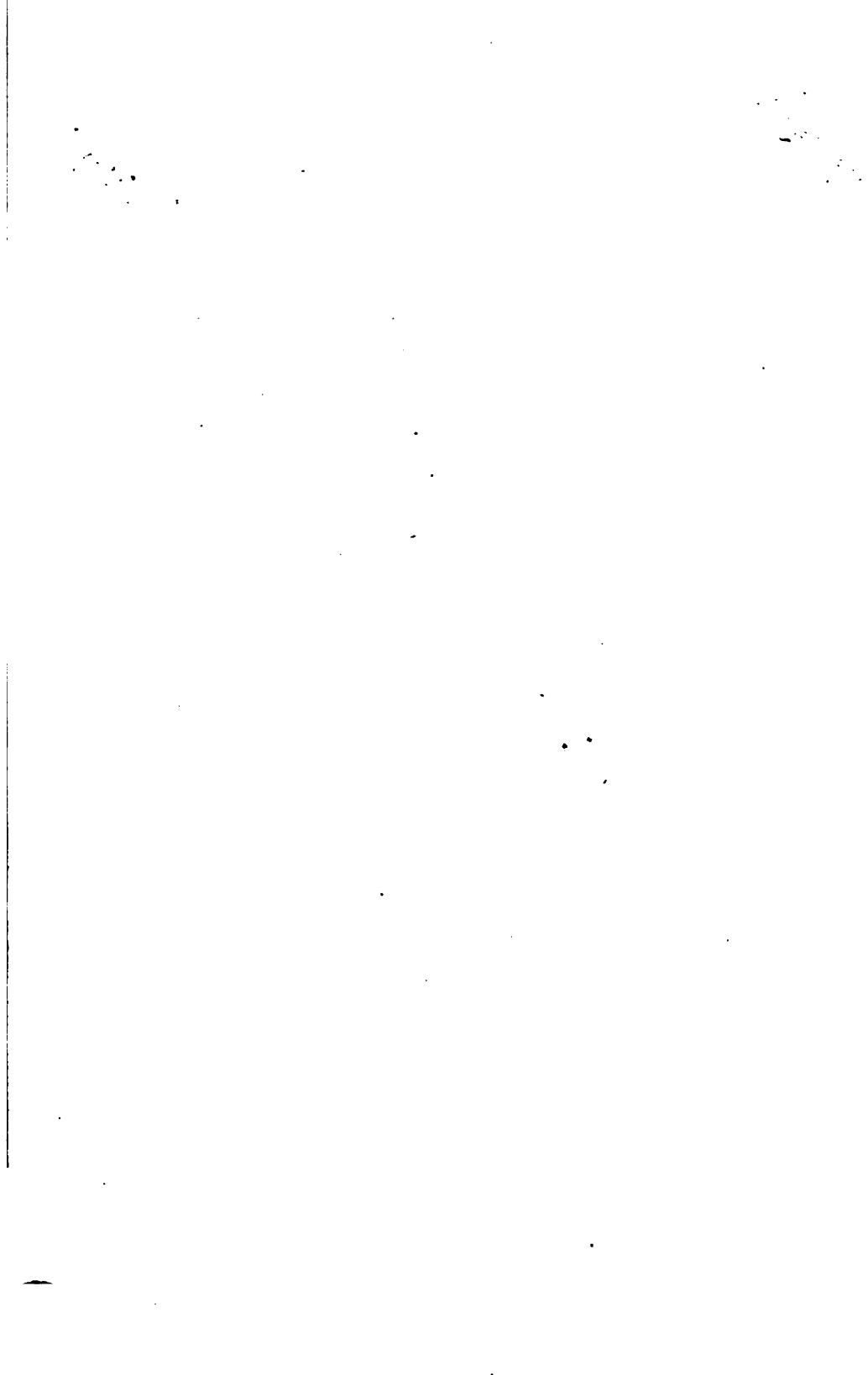
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Ch. Brit. Court of Bankruptcy.
REPORTS
OF
CASES IN BANKRUPTCY,

DECIDED BY
THE LORD CHANCELLOR
BROUGHAM,
THE COURT OF REVIEW,
AND
SUBDIVISION COURTS.

By **BASIL MONTAGU AND SCROPE AYRTON, Esqrs.,**
BARRISTERS AT LAW.

WITH
A DIGEST
OF THE CASES REPORTED IN THIS VOLUME,
AND OF
THE CONTEMPORARY CASES RELATING TO BANKRUPTCY
DECIDED IN ALL THE OTHER COURTS.

VOL. I.

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PREFACE.

THESE Reports will for the future be continued without any delay. The second Number, containing all the Cases decided between the 1st of January and the last day of Easter Term, will very shortly be published; and the Numbers will, for the future, be published as soon as possible after the conclusion of each term.

IN a debate on the Bankruptcy Court Bill (*a*), 12th October 1831 (*b*), the Solicitor General said, “What would the house think when he told them, that in all the reports there was not one report of a cause decided before the commissioners—no report of any argument held before them. In short, they were never considered to form a court for the purposes of law, all matters of law in bankruptcy going directly or indirectly to the other courts.”

(*a*) 1 & 2 W. 4. c. 56.

(*b*) See Debates.

FROM the present constitution of the Subdivision Courts—from the great and patient attention devoted to every argument submitted to their consideration—from every case being fully heard, deeply considered, and speedily decided—I am satisfied that, before much time passes away, it will be discovered that they are the most efficacious tribunals in Europe for the administration of the bankrupt laws. This is one of the advantages attendant on the division of labour.

THIS Number contains a report (a) of one of the decisions of a Subdivision Court; and, when any case of importance occurs, these reports will be continued.

It is my intention that each Number of the reports shall contain one or two queries on the improvement either of the bankrupt laws or of the courts for its administration, with the conviction, that if my inquiries may not be productive of good, they cannot be attended with evil.

TAUGHT in early life by Lord *Bacon*, “that every man is a debtor to his profession, from the which, as men do of course seek to receive

(a) *Ex parte Marshall*, 1 Mont. & Ayr. 118.

countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help thereunto;" and remembering that Sir *Edward Coke*, differing as he did from Lord *Bacon* upon all subjects, except the advancement of their noble profession, expresses the same sentiment, almost in the same words. "If this," he says, "or any other of my works, may in any sort, by the goodness of Almighty God, who hath enabled me hereunto, tend to some discharge of that great obligation of duty wherein I am bound to my profession, I shall reap some fruits from the tree of life, and I shall receive sufficient compensation for all my labours." I have, under the influence of these opinions, endeavoured, to the best of my ability, to make such poor return as I have been enabled, for the many blessings which I enjoy from my profession. I have, when sharing the fruits, endeavoured to strengthen the root and foundation of the science itself.

From this motive, I venture, after thirty years labour upon the bankrupt laws, to submit these enquiries to the consideration of my profession.

Quære 1. OUGHT a partner in all cases to be permitted to prove against the separate estate of

his partner. By the cases he cannot prove until the joint creditors be paid. *Ex parte Moore*, 1826, 2 Gl. & J. 166; *ex parte Gibson*, 1827, 2 Gl. & J. 233; *ex parte Carter*, 1827, 2 Gl. & J. 233; *ex parte Ellis*, 1827, 2 Gl. & J. 312; *ex parte Grazebrooke*, 1832, 2 Dea. & Ch. 186.

SUCH are the cases; and to such an extent have the decisions been carried, that the partner cannot claim upon indemnity against the joint estate.

THE principle of this rule appears to be, that the partner may by possibility stop *in transitu*, or diminish the surplus which would be carried over to the joint estate, and ought to be applied in payment of the joint debts for which he is liable. *Ex parte Moore*, 2 Gl. & J. 169, in which case it is said in argument, "This is a very remote contingency for the foundation of such a rule, and which, even if well founded, is rather a question for the reservation of the dividend than of the right of proof.

SUPPOSING the principle to be well founded, will not the justice of the case be attained by retaining the dividend until the right is established?

PREFACE.

v

Is it right that the separate creditors should benefit from the possibility of injury being sustained by the joint creditors?

Is it right that the creditor should be barred by the certificate when he cannot prove his debt? In *ex parte* Executors of *Godwin*, cited 2 Gl. & J. 235, Sir *John Leach* thought that the debt should be proved, and the dividend reserved; but this decision was reversed in *ex parte Carter*, 2 Gl. & J. 240. And quære, whether the decision in *ex parte Grazebrooke*, 2 Dea. & Ch. 190, be not in concurrence with the judgment of Sir *John Leach*.

Quære as to the Court.

UPON a commitment by one commissioner to a messenger, is it preferable to refer to the Sub-division Court of which the commissioner is a member, or to that of which he is not a member? See *ex parte Bardwell*, 1 Mont. & Ayr. 193.

B. M.



PREFACE—*Continued.*

QUÆRE. Ought a joint creditor to be deprived of his right to prove under a separate commission or fiat, because there is a solvent partner against whom he may proceed?

By the present law, he cannot prove if there be a solvent partner.

IN *ex parte Pinkerton*, April 1801, 6 *Ves.* 814, there was a solvent partner abroad, and not likely to return; the proof was ordered to be admitted against the separate estate, there being no joint estate.

Ex parte Kensington, *ex parte Taylor*, Jan. 1808, *ex parte Kendall*, April 1808, 14 *Ves.* 447, 449; in these cases it was determined that a joint creditor could not prove to receive dividends under a separate commission, without resorting to the solvent partner, and Lord *Eldon* said that he was influenced in *ex parte Pinkerton* by the solvent partner being abroad.

Ex parte Janson, 1818, *Buck*, 227, a commission issued against one of two partners, the other partner was admitted to be insolvent, but no commission had issued against him ; it was determined that such insolvent partner was a solvent partner within the meaning of this rule, and the creditor was not permitted to prove till he had proceeded against the insolvent partner called solvent : the reason assigned for this decision is as follows : the inability of the debtor to pay all his debts does not take it out of the general rule, because it does not follow that a diligent creditor may not get the whole of his debt paid.

Ex parte Morris, 1831, *Mont.* 21 : the partner against whom a commission had not issued had applied to take the benefit of the insolvent act, and in his schedule had stated that he had not a farthing of assets to be applied in payment ; the Court held that this insolvent partner was solvent within the meaning of the rule.

SUCH are the cases, from which it appears that a creditor must proceed at law even against an insolvent debtor, at the certain peril of costs,

not proveable under the commission. The principle is said to be, that the creditor ought to resort to the solvent partner, because, as between him and the bankrupt there may be no right of proof, and that this can be established only by a bill in equity.

Qu. 1. Why is a creditor to be deprived of his legal rights for the benefit of any person?

Qu. 2. Supposing he ought to be deprived, ought not a claim to be entered for the debt, and the assignees undertake for the costs which may be incurred for the benefit of the assignees?

Qu. 3. Ought not the proceeding at law to be by the assignees using the name of the creditor?

Qu. 4. Supposing the principle to be well founded, can it apply where the partner is not solvent but insolvent?

Qu. 5. Supposing it to be just to compel the creditor to resort to the partner who is not a bankrupt, when he is, in fact, indebted to the bankrupt, is it just that the creditor should be so compelled, when the person against whom

the commission has not issued, instead of being a debtor is a creditor of the bankrupt's ?

Qu. 6. Ought there not to be some regulation as to the *ex parte* declarations of bankruptcy ? See *ex parte Nokes*, post, page 461.

B. M.

CASES

IN

BANKRUPTCY.

ROBINSON and GREENWOOD, assignees of *At the Rolls.*
Samuel Churchill, plaintiffs, *versus* **LORD CAR-** *April 29,*
RINGTON, JAMES JAMES, and others, *May 1,*
 defendants. *1833.*

ON 26th March 1827 a commission of bankrupt issued against *Samuel Churchill*, under which the plaintiffs were the assignees. The bill stated that *Samuel Churchill* had been for many years in extensive practice as an attorney, and had become largely indebted to various persons; that early in 1826 he consulted *James* on the embarrassed state of his affairs; that by indentures, dated the 17th and 18th of July 1826, it is witnessed, that (for a nominal consideration) *Churchill* appointed, granted, sold, and released and assigned all his messuages, lands, tenements, and hereditaments in the county of Oxford, unto and to the use of *Benjamin Churchill* and *James James*, their heirs, executors, administrators, and assigns, upon trust and to the intent that the said *Benjamin Churchill* and *James James*, &c. should, without any further directions from the said *Samuel Churchill*,

A conveyance of part of a bankrupt's property in trust to sell and dispose of the proceeds as he shall direct, is not an act of bankruptcy.

1833.

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and others.

&c., sell and dispose of the same, at such time or times, and for such sum and sums, as the said trustees or trustee should in their discretion think proper; and the said *Samuel Churchill* declared, that the trustees should and might, till the sale of the said estates, receive the rents and profits thereof, and raise any sum by mortgage thereon, and renew the leases thereof, and that the receipts of the trustees should be good discharges, &c.; "and that the said trustees or trustee should stand possessed of the monies which should arise from any sale or mortgage of the said hereditaments and premises, in trust for such purposes as he the said *Samuel Churchill* should by deed or any writing under his hand direct; and in default of and until such direction, in trust for the said *Samuel Churchill*, his heirs, executors, administrators, and assigns; and that, as between his devisees on the one hand, and his executors and administrators on the other hand, the money to arise by sale of the said freehold hereditaments, or any part thereof, which should not have been made, or contracted to be made in his lifetime, should be considered as real estate, unless he should direct the contrary;" that the estates so conveyed constituted the great bulk of his property; that at the date of the indentures of the 17th and 18th July 1826 an officer of the sheriff of Oxford was in the house of *Samuel Churchill* in possession, and that the officer held warrants upon six writs of execution, of which one was on two notes for such small sums as 27*l.* each; that a writ of *elegit* to levy a sum of 3,000*l.* and upwards had been and was then in force against the lands of *Samuel Churchill*, and there were eight actions at law and two suits in equity then depending against him, and that he was insolvent; that the indentures were not executed in July 1826, the time at which they bore date, and not until late in January or early in

CASES IN BANKRUPTCY.

3

February 1827, when they were antedated ; that before the execution of any of the indentures by any of the parties thereto, viz. on the 9th of November 1826, *Samuel Churchill* left his dwelling-house, and absconded out of the county of Oxford, in order to avoid his creditors.

1833.

—
ROBINSON
and another
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CARRINGTON
and others.

The bill further stated, that *Samuel Churchill* had committed an act of bankruptcy by breaking an appointment to meet his creditors.

Under these circumstances, the plaintiffs, as assignees, contended that the indentures of the 18th of July were void, and an act of bankruptcy, and that they were entitled to all the estate and interest of *Samuel Churchill* in the estate comprized in the indentures, together with divers conveyances which the trustees had executed in pursuance of such deed to the different defendants.

Mr. Bickersteth, *Mr. Pemberton*, and many other gentlemen (eighteen in number), for the different defendants, contended,

1st, That the indentures of 17th and 18th of July 1826 were not an act of bankruptcy.

2dly, If they were, that the parties had not notice, and the commission did not issue till more than two months after the execution of the deed.

3dly, If the parties had notice, it could not be invalidated under the commission, which did not issue till more than two months after the execution of the deed.

1st, The deed is not an act of bankruptcy.

It is merely a conveyance by *Churchill* of part of his property, for the purpose of converting realty into personalty, in order to meet present exigencies, which, it has been settled, by *Berney v. Davidson*, 1 *Brod. & Bing.* 409, and 4 *Moore*, 126, and *Berney v. Viner*, 4 *Moore*,

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323, is not an act of bankruptcy; and, so far from being injurious to creditors, it is only doing what the execution creditors had themselves power to do.

2dly, If it is an act of bankruptcy, the parties had not notice, as the indentures are an assignment only of part of the property; and the commission did not issue until the 26th of March 1827, which being more than two months from the execution of the indentures, they are protected by 6 Geo. 4. c. 16. s. 81. (a)

If it is to be contended that notice of the existence of the deed implies notice of the intent of the deed, the answer is contained in *Read v. Ward*, 7 Vin. 122, by which the contrary is decided.

3dly, If it is an act of bankruptcy, and the parties had notice, it cannot be invalidated under this com-

(a) "And be it enacted, that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued,

had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: Provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution or attachment, shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing of the first commission."

mission, which did not issue till more than two months after the execution of the deed. *Jackson v. Barrow*, 3 Carr. & P. 87.

Mr. Tinney, Mr. Swanston, and Mr. Montagu for the assignees :—

1st, The deed is an act of bankruptcy. Any deed with an intent to prefer a creditor is, upon the principle of equal distribution, upon the principle of the equity of equality, an act of bankruptcy. The only difficulty consists in discovering the intent. When the preference is obvious, as in an assignment by a trader of the *whole* of his property, or of so much as will *incapacitate* him from trading, there is no difficulty. The Court infers the *intent* from the *act*. It says men must intend the obvious consequences of their actions.

The doctrine is the same, for the principle is the same, when only *part* is assigned, although the difficulty, from the intent not being obvious, is increased.

It is necessary, therefore, to resort to extrinsic circumstances, as, whether the trader was solvent or insolvent; whether the execution was secret or public; whether possession was or was not delivered; whether it was voluntary or from pressure; with all the various acts to which reference may be made when endeavouring to discover the secret motive by which the trader was influenced. The cases in support of this doctrine are numerous, and of great authority,—*Worsley v. Demattos*, 1 Burr. 467; *Linton v. Bartlet*, 3 Wils. 47. This short case explains the whole principle of the law. It is as follows :—

A trader, being insolvent, in consideration of a loan of 120*l.*, assigns one third part of all his effects to the lender, who is his brother, and within two days after the making the deed the trader absconds, and is declared a bankrupt.

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Per Curiam:—Although this may be a hard case upon the brother, who is a *bond fide* creditor, yet the giving him the preference is a fraud upon all the laws concerning bankrupts, which proceed upon equality, and say that all the creditors shall come in *pari passu*. There is no case where ever such a preference as this was allowed. The same spirit of equality ought to warm the courts of justice which warmed the legislature when they made the bankrupt laws; and if we should let this deed stand, we should tear up the whole bankrupt laws by the roots; it is a bill of sale made by a trader at a time when he was insolvent, and plainly had an act of bankruptcy in contemplation; it is partial, and unjust to all the other creditors.

Judgment for the plaintiff that the deed is void.

The doctrine in *Linton* and *Bartlet* is thus recognized by Lord Mansfield in *Harman v. Fisher, Cowper*, 117. He says, “The case of *Linton* and *Bartlet* has determined that, though the act be complete, yet, if the mere and sole motive of the trader was to give a preference, it shall be void, and, if by deed, is in itself an act of bankruptcy. In that case the goods assigned were not more than one third of his effects; upon what then was the opinion of the Court founded? Not upon an assignment of one third, being the same as an assignment of all his effects, but upon the ground that the trader gave a preference, and upon his sole motive being to do so. If he can give it to one, he can give it to another, which would establish this principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper.”

The same principle is recognized by Lord Ellenborough in *Newton v. Chantler*, 7 East, 143, where his Lordship says, in words which may be used in the present case, “The trader was in insolvent circumstances, and known

to himself to be so at the time. Now the execution of such a bill of sale, under these circumstances, has in all the cases been considered *prima facie*, at least, as fraudulent; and it is incumbent on the party who sets it up to show something to rebut that presumption. As a general proposition, it cannot be disputed that a conveyance by deed by a trader of all his property to a particular creditor, in prejudice to the rest, is an act of bankruptcy. Every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. Here the necessary effect of this act was to turn round all his other creditors, and prevent them from pursuing their present ordinary remedy against him for the payment of their demands, leaving them only to look to him for the future surplus, if any. With respect to the supposition, that, according to the doctrine of *Berney* and *Davidson*, this is not an act of bankruptcy, as it merely converts realty into personalty for the benefit of the creditors, it is a misapplication of the authority of *Berney v. Davidson* to the present case, in which the facts are wholly different. That there may be cases in which a trader may convert realty into personalty for the purpose of discharging debts may be readily admitted, and it will not be denied that it is equally true, that there may be cases where such conversion may be an act of bankruptcy; *ex parte Meyer*, 1 *Mont.* 292. *Berney v. Davidson* was a case of the first class, but it was never supposed to be an authority for such conversion in *all cases*. It was not so argued, recognized, or decided. The cases are *Berney* and *Davidson*, A. D. 1829, 1 *Bro. & Bing* 409, 4 *Moore*, 126; *Berney* and *Viner*, 1820, 4 *Moore*, 322.

The case, as reported in 4 *Moore*, shows the principle upon which it was decided, and a moment's consideration of that principle will show how inapplicable *Berney v.*

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Davidson is to the case now before the Court. Mr. Serjeant *Lens* in argument said, "A transfer of part of a trader's property, for the purpose of raising money by way of mortgage, or for the purpose of carrying on trade, is not an act of bankruptcy. Here there was a transfer of only part of his property, to protect and not to defraud or delay his creditors; neither does the transfer amount to a fraud in law, as there was a very large surplus remaining after the property was conveyed. The general principle, with respect to such transfer of property, must be confined to the particular circumstances of each particular case; a principle which was recognized by the Court in *Berney v. Viney*, 4 *Moore*, 326, where the Court says, "It appears that the legal effect of the deed was to provide a speedier payment to the creditors at large by converting his real into personal property.""

Such is the case of *Berney* and *Davidson*, every fact of which is totally different from the present. In *Berney* and *Davidson* the debtor was an old man of eighty, of large property, who was wholly ignorant of business, having been only a dormant partner, and involved in ruin by the misconduct of his partner. His only wish was to pay the creditors by a sale of part of his realty. In the present case the debtor was an active solicitor, was steeped in bankruptcy, having dishonoured all his bills, and being surrounded by executions, of which one was for the small sum of 27*l.* He was insolvent beyond the possibility of redemption, and the conveyance, as is proved by the event, was so far from being beneficial to creditors, that it has secured 20*s.* in the pound to a portion, and left the general body a dividend not amounting to 2*d.* in the pound.

With respect to the position, that this conveyance is not productive of any evil, as it is merely doing what the

creditors might themselves have done, the answer is obvious. It has produced all the evil; it has produced this suit; it has given to one class of creditors 20s. in the pound, and to the others not as many pence, by placing the property beyond the reach of the law, by which each creditor has been delayed, and may ultimately be defeated. If the execution creditors had proceeded in regular course, it would have been attended with the result of every day's practice. The general creditors, attentive to their own interests, would have inquired and discovered anterior acts of bankruptcy (which did exist) by which the executions would have been defeated; inquiries which, by this assignment, have been prevented.

2dly, The parties had, in legal construction, notice that the deed was an act of bankruptcy; for notice of the existence of a deed, with notice of such facts as existed in the present case, is implied notice both at law and in equity. In *Heirne v. Mill*, 13 *Ves.* 121, the Lord Chancellor, when considering the various cases of constructive notice, says, "Another case is, where the law imputes that notice, which, from the nature of the transaction, every person of ordinary prudence must necessarily have. In the case of *Hill v. Simpson*, *Fitz.* 211, 3 *Atk.* 294, 2 *Atk.* 242, 3 *Atk.* 392, there is a direct recognition of the principle which is laid down in many cases. In *Taylor v. Hibbert*, 2 *Ves.* sen. 437, Lord *Rosslyn* states it thus: "I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whosoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have. It has been determined, that a purchaser, being told particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking

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for granted it was only from year to year, was bound by the lease that tenant had, which was a surprise upon him. That was rightly determined, for it was sufficient to put the purchaser upon inquiry that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests, as to the extent and terms of which it was his duty to inquire."

The same principle is laid down in *Ferrars v. Cherries*, 2 Vern. 384; and the reason is, that the titles of other men ought not to be shaken by creating a title, vested in a third person, through his own folly. The settlement after marriage did not recite the previous agreement, but it was held that the party ought to have gone to the wife's relations. In *Spratt v. Hobhouse*, 4 Bing. 180, upon a question whether a party had notice of an act of bankruptcy, it being admitted that he had notice of a docket having been struck, and he having refused to pay without an indemnity, the Court says, "On the other side of Westminster Hall, direct notice of an incumbrance has never been esteemed necessary to fix a purchaser; it is enough if he has been fairly put on his guard. The rule is, that where a purchaser could not have satisfied himself with a title but by looking at a deed which was necessary to complete the title, he shall be holden to have done so, otherwise he must take the consequence of *crassa negligentia*. According to the late acts, a party paying money after an act of bankruptcy is not liable to refund, unless at the time he was apprised of the circumstance; but he may be apprised in various ways; and though notice of a docket may not of itself be esteemed notice of a bankruptcy, yet, connecting such a notice with the circumstances of the defendants requiring security before they made the payment, no jury could

doubt that they had been sufficiently apprised of the act of bankruptcy."

It is the same with respect to a deed as with respect to any other act of bankruptcy. A denial to a stranger would not excite any suspicion in his mind, or, if he did not inquire into the cause of the denial, would it be any evidence of notice of an act of bankruptcy; but denial to a creditor who called again and again for payment of a debt would be such notice of the act as to be evidence of his notice of the intent. With respect to the case of *Read and Ward*, 7 Vin. 122, the words of the Chancellor are, "Notice of the deeds is not notice of the fraudulent intent, other than to *M. K.* who was a party."

To apply this doctrine to the present case. The parties knew the situation of the bankrupt, that he was insolvent, violating engagements to meet his creditors, with eight or ten executions in his house, and one for such a small sum as 27*l.* Were not these facts sufficient to apprise them of the necessity of inquiring with what intent the deed was executed?

2dly, If they had notice of the deed and of the intent, it is not protected because the commission did not issue within two months. Mr. *Beames* says, "that the deed, although it might be an act of bankruptcy, and invalidated under a commission which issued within two months of its execution, cannot be invalidated under this commission, which did not issue until more than two months after the execution; and in proof of this position he has referred to *Tucker and Barrow*, 3 Carr. & P. 87, by which it is determined that a preference cannot be invalidated under a commission that does not issue until after the lapse of two months from the time of the preference; but this *nisi prius* decision, which was clearly a mistake, is overruled by *Beven v. Nunn*, 9 Bing. 110, and 2 M. & S. 132.

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4thly, He committed an act of bankruptcy by absenting himself, as he broke an appointment to meet his creditors, and broke it with the intent to delay them, of which the parties had notice. The cases upon this subject are, in order of time, as follow: *Schooly v. Lee*, 1822, 3 *Stark.* 149. The bankrupt was liberated on a promise that he would return and execute a bail-bond; he did not return according to his promise. *Abbot*, C. J.:—He absented himself, not in order to avoid a creditor with whom he had made an appointment, but merely to avoid the execution of a bail-bond. *Tucker v. Jones*, 1824, 2 *Bing.* 3-9, *B. M.* 24. The bankrupt promised to meet an agent of the creditors, as to giving security for a debt; he broke his appointment; the Court held that it was not an act of bankruptcy, as there was no evidence of an intent to delay creditors. *Key v. Shaw*, 1832, 1 *M. & S.* 464. In this case Mr. Justice *Park* said, "There was one point urged in argument to which I do not accede, viz. that a failure to keep an appointment made with a creditor constitutes an act of bankruptcy. In *Toleman v. Jones* it was expressly held, that merely appointing to meet a creditor at a given place, and failing to do so, is not an act of bankruptcy." Lord Chief Justice *Best* there said, "The intent to delay a creditor (which is a proof of fraud or insolvency) is the essence of the act of bankruptcy which this person is supposed to have committed. There was not even *prima facie* evidence of such an intent. It was only proved that he made an appointment with a creditor to meet him, and he did not keep that appointment. If a jury could, without more evidence, presume that he broke that engagement to delay his creditor, there are very few in the commercial world that could be assured they were not bankrupts. *Robson v. Rolls*, 1833, 9 *Bing.* 648. A trader, apprehensive that a *ca. sa.* had been issued against him in Middlesex,

stopped at the end of Chancery Lane till he learnt that a *ca. sa.* had not issued. *Tindall*, C. J., thought this did not amount to an act of bankruptcy. On a motion to set aside the verdict, the rule was made absolute, as the stopping at the end of Chancery Lane was an absenting and an act of bankruptcy. (a)

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THE MASTER OF THE ROLLS:—

I am quite satisfied on this point. I consider it clear that the bankrupt, in thus absenting himself from the meeting of North Aston, committed an act of bankruptcy, and that *Benjamin Churchill*, one of the trustees, had notice of that act of bankruptcy at the time he delivered the conveyance; I consider these points to be clear upon the evidence produced and the cases cited. But the bankrupt has conveyed, and the commission did not issue within two months of the transaction.

Breaking an
appointment to
delay creditors
is an act of
bankruptcy.

Mrs. *Greenwood*, the plaintiff in this case, having a demand upon *Samuel Churchill* for the sum of 2,200*l.*, in respect to trust monies possessed by him, an application on her behalf was made to *Churchill*, with strong pressure for a security, early in the year 1826. Upon that occasion *Churchill* gave his bond for the amount, with interest, I think at two months; that bond became due, and it was not paid; and not being paid, Mrs. *Greenwood*, the plaintiff, brings an action upon the bond, and obtains judgment. In the month of October 1826, Mr. *James*, the brother-in-law of *Churchill*, and the trustee under the deed, which is in this case impeached as an act of bankruptcy, applies to Mrs. *Greenwood*, and proposes, that if she will not execute her avowed intention to sue out execution on the judgment obtained on this bond on the following Michaelmas, that *Churchill* was ready, together with the trustees of that deed, to

(a) See *Lees v. Marton*, 1 *M. & Robinson*, 210.

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execute a security to her for the amount on his Oxfordshire estate. Mrs. *Greenwood* was advised to accept this proposal; and deeds are accordingly prepared, stating the consideration to be the undertaking not to sue out execution; and those deeds *James* the trustee undertakes to get executed. It appears, in point of fact, that although dated when the agreement was made, namely, on the 27th of October, they were not actually executed till the month of January following; and the acknowledgment of the satisfaction of the judgment was not entered till a subsequent period. It is stated, on the part of the assignees of *Churchill*, against whom a commission of bankrupt subsequently issued, that Mrs. *Greenwood* is not entitled to the benefit of this security, because this security is in fact derived from certain trust conveyances executed by *Churchill*, by deeds of lease and release, on the 17th and 18th days of July 1826, and that those deeds were in fact an act of bankruptcy, and consequently her title derived from the trustees under those deeds was not available. The first consideration, therefore, in the case, is, whether these deeds of the 17th and 18th of July 1826 were or were not an act of bankruptcy. Any deed executed by a trader, with an intent to defeat or delay his creditors, is an act of bankruptcy; and that intention may appear upon the face of the deed, or that intention may be proved by extrinsic circumstances. In this case it is argued both ways; it is said that the intention appears on the face of the deed; it is said also that it is proved by extrinsic circumstances. Upon the face of the deed the recital is an intention to convey his freehold and leasehold estates to trustees, and an actual conveyance of his freehold and leasehold estates in Oxfordshire to trustees, with a power to them to sell or mortgage and apply the money as he shall direct, and to repay to him

all monies that shall not be applied according to his direction ; and the question is, whether, upon the face of the deed, there is an act of bankruptcy ? whether this deed discloses, by its recital or its provision, an intention to defeat or delay the creditors ? It has not been stated in what manner the creditors could be defeated or delayed by this deed, if executed according to its avowed purpose ; and I am perfectly at a loss to understand how any creditor can be said to be defeated or delayed by the provisions of the deed. It is a power given to trustees, that they may become substitutes for the bankrupt, in order to convert into money his real estates, to be applied as the bankrupt himself should direct. The bankrupt remains to all intents and purposes in the same beneficial ownership of the property as he was actually in before he executed the deed, and the creditor is in no manner defeated either of his legal or equitable right. If the effect of this deed were to prevent the legal execution of the creditor, it might then be said, that, upon the face of the deed, it would operate to defeat or delay the creditor ; but, by the statute of frauds, inasmuch as the beneficial interest remains in the bankrupt, the creditor has the same legal right of execution as if no such deed had ever been executed. There is no intention expressed upon the deed to give a preference to any particular creditor ; the sole purpose is, that the trustees are to take upon themselves the conversion of the property which, before the deed was executed, was solely in the power of the bankrupt.

The extrinsic circumstances relied upon are, the circumstances of great embarrassment on the part of the bankrupt, and that he was overwhelmed with debt. It appears upon the evidence that these circumstances certainly induced the deed, for the state of the bankrupt's affairs had so affected his mind, that his friends

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considered he would not be equal to the conversion of the property necessary to relieve him from his embarrassments; and it appears on the evidence in the cause, that it was from that motive alone that he was advised to execute this conveyance, and for no other purpose than to place in his stead persons who, not being under this depression of spirits, and this affection of health, which was the consequence of this depression, would be better able to manage the affairs than he himself could do if he personally interfered. It so happens that this motive for the conveyance is precisely the motive which took place in the case of *Mr. Boehm*, whose age and infirmities induced a similar conveyance; and it was held, as must be held every where, that the deed, being executed from such a motive, could not be considered as executed with a view to defeat or delay creditors, but solely for the purpose of relieving himself from a trouble which, from his infirm state of health and his age, he was incapable of undertaking. The extrinsic circumstances, therefore, no more than the terms of the deed, afford evidence of any intention to defeat or delay the creditors.

The next consideration is, whether the deeds executed in favour of *Mrs. Greenwood* (however the other deeds might have been executed) could be considered as given to her with a view to give her a fraudulent preference to the other creditors. Now, though that has been hinted at, it has not been argued that it was a security given to her under a pressure as a consideration for the release of the bankrupt, and would therefore, on all the principles applied to cases of this sort, be considered as not simply a fraudulent preference, but as consequence of the necessities which the bankrupt was under, by the pressure of his creditor, to give a satisfaction for his debt. It appears to me that

I need say little more on this case, because, such being the state of the facts, it is difficult to conceive the principles upon which this deed can be questioned. It has been argued, in the latter part of this case, that there was another ground which ought to be taken into consideration, that the bankrupt had committed an act of bankruptcy, with a knowledge of one of the trustees, prior to the execution of the trust-deed, and that such person was not capable therefore of taking a conveyance from the bankrupt, because he had full knowledge of the bankrupt's inability to give a valid conveyance. It occurred to me, upon this statement, that it was a fact quite immaterial, because *Mrs. Greenwood* takes her interest in the estate, not from the trustees, but from the bankrupt himself, who was a party to her conveyance. If, in consequence of the act of bankruptcy committed with the knowledge of the trustees, no estate would pass by the effect of this deed to the trustees, the estate would necessarily pass as a security to *Mrs. Greenwood* by the effect of the deed to her.

It has been said, that the point is not raised by the facts of the case; I rather think the point is raised by the facts of the case. I incline strongly to the opinion that an act of bankruptcy was committed by the bankrupt by the transaction of North Aston; and I am strongly of opinion, too, that *Mr. Benjamin Churchill*, one of the trustees, had notice of that act of bankruptcy; but it appears to me, for the reasons I have stated, to be immaterial. If it had been otherwise, I would not have decided either of these facts on the evidence, but would have sent it to a jury to try both those facts; but being of opinion that those facts are not important, I feel it my duty to decide this case on the short ground I have stated, without calling for the assistance or intervention of a jury.

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L. C. *Ex parte* ROBINSON. — In the matter of HOUGHTON and WATTS.
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A solvent partner may, after a secret act of bankruptcy committed by his co-partner, make the firm liable by accepting a bill for a previous liability.

THIS was an appeal from the decision of the Court of Review in *ex parte Ellis*, reported *Mont. & Bli.*, page 249, upon the following

SPECIAL CASE.

Previously to the issuing of the commission herein-after mentioned, the said bankrupts carried on business in Soho Square, as drapers and copartners, under the name and firm of *Houghton and Watts*.

On the 4th January 1832 the said *James Houghton* absconded and committed an act of bankruptcy. Upon the following day the said *John Watts* accepted, in the names of the said firm, and delivered to *Evan Davies*, three bills of exchange, of which the following are copies :

£500.

London, Dec. 31, 1831.

Two months after date pay to my order five hundred pounds, value received.

To Messrs. Houghton and Watts, }
 Soho Square.

EVAN DAVIES.

(Accepted)

(Indorsed)

At

Pay Mr. W. Robinson or order,

Messrs. Prescott, Grote, and Co.

EVAN DAVIES.

HOUGHTON and WATTS.

WM. ROBINSON.

£750.

London, Dec. 31, 1831.

Two months after date pay to my order seven hundred and fifty pounds, value received.

To Messrs. Houghton and Watts, }
 Soho Square.

EVAN DAVIES.

(Accepted)

(Indorsed)

At

Pay Mr. W. Robinson or order,

Messrs. Prescott, Grote, and Co.

EVAN DAVIES.

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£300.

London, January 2, 1832

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Two months after date pay to my order three hundred pounds, value received.

To Messrs. Houghton and Watts, }
Soho Square.

EVAN DAVIES.

(Accepted)

(Indorsed)

At

Pay Mr. W. Robinson or order,

Messrs. Prescott, Grote, and Co.

EVAN DAVIES.

Houghton and Watts.

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The said bills were not drawn on the days on which they respectively bear date, but on the 5th January aforesaid, and were accepted and delivered by the said *John Watts* as aforesaid, as a security for liabilities contracted by the said *Evan Davies* upon certain bills of exchange, before the said 4th day of January, accepted by the said *Evan Davies* for the accommodation of the said bankrupts, and which bills were then outstanding in the hands of third parties. When the three bills above set out were so given to the said *Evan Davies*, he knew that the said *James Houghton* had absconded, and had committed an act of bankruptcy.

On the same day the bills were indorsed by the said *Evan Davies*, and remitted to one *William Robinson*, and by the said *William Robinson* placed to the credit of the said *Evan Davies* in account.

At the time of such remittance the said *Evan Davies* was indebted to the said *William Robinson* in the sum of 2,000*l.*, and the said bills were *bonâ fide* so credited by the said *William Robinson*, in ignorance of the circumstances under which they had been accepted, and without notice of the act of bankruptcy having been committed by the said bankrupts, or either of them.

On the 6th of January the said *John Watts* also committed an act of bankruptcy.

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On the 10th a commission of bankrupt under the Great Seal of Great Britain was issued against the said *James Houghton* and *John Watts*, under which they were declared bankrupts; and *Wynn Ellis*, *Andrew Caldecott*, and *William Dean* were chosen assignees.

The said *William Robinson* tendered the said three bills of exchange for proof under the said commission, against the joint estate of the said bankrupts, and the proof thereof was admitted by the commissioners.

The said *Wynn Ellis*, *Andrew Caldecott*, and *William Dean*, in the month of November 1832, presented their petition to the Court of Review, praying that the said proof of the said three bills of exchange, amounting to the sum of 1,550*l.*, so made by the said *William Robinson*, might be expunged; and on the 14th of February 1833 the said petition came on to be heard before the said Court.

The Court was of opinion, that the said *William Robinson* was not entitled to prove the said bills, or either of them, against the joint estate of the bankrupts; and therefore ordered the proof to be expunged accordingly, and that the costs of the petitioners and respondents should be paid out of the estate of the bankrupts.

The question is, Whether, under the circumstances aforesaid, the said *William Robinson* was entitled to prove such bills against the joint estate of the bankrupts?

I think this a proper case to be presented upon appeal to the Lord Chancellor.

14th March 1833.

GRIFFITH RICHARDS.

Approved of and certified by me,

14th March 1833.

T. ERSKINE, C. J.

Sir *E. Sugden* and Mr. *Richards* for the appellants :—

The question is, Whether, after an act of bankruptcy by one of two partners, the solvent partner can bind the firm by accepting a bill in the name of the firm for a partnership liability ; and whether a bill so accepted is or is not, on the bankruptcy of both partners, proveable, in the hands of a *bond fide* holder, against the joint estate ? In considering this, two questions arise,

First, Whether, in the ordinary case of a secret dissolution of a partnership, the power of one partner exists so as to enable him to make his co-partner liable ?

Secondly, assuming that he may, Whether there is any difference when the dissolution is caused by the bankruptcy of one partner ?

First, upon the question, in ordinary cases, Whether a partner can, after a secret dissolution, bind the firm ? there cannot exist any doubt. One partner may bind the firm previous to notice of the dissolution. *Osborne v. Harper*, 5 *East*, 225 ; *Goode v. Harrison*, 5 *B. & A.* 157 ; *Williams v. Keates*, 2 *Stark.* 290, and various other cases.

In *Goode v. Harrison*, 5 *B. & A.* 157, an infant had been in partnership, but upon his attaining twenty-one he did not manifest his disaffirmance of the partnership : and *Abbot*, C. J., says, “ No doubt *Bennison*, whilst under twenty-one, had been a partner, and had held himself out as such to many persons, and amongst others to the plaintiff. Upon his coming of age he does nothing. He indeed ceases to act as a partner, or to purchase goods, but he gives no notice to any body that he has so ceased. Then it is insisted on his behalf, that as all he did in the character of a partner was done in his infancy, this was not necessary ; and that he is not liable, unless it be affirmatively shewn that he was a

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partner with *Goode* when he came of age. If once a person holds himself out as being a partner, till he gives notice he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as such, and he is bound by that representation. It is not necessary, in fact or in law, that to create a legal obligation a partnership should be still continuing. The legal obligation may arise from the acts of the party. Here, during infancy, the defendant acts as partner, and when he comes of age he forbears to inform the world that he was not so." A dissolution, therefore, does not terminate the liability of a partner for the acts of his co-partners, unless notoriety of the dissolution is duly given.

Secondly, with respect to the question, when the dissolution is by bankruptcy, there is not any difference either upon principle or upon decision, although there may be some apparently conflicting dicta upon the subject.

Upon principle it is clear; for if the law were as is contended by the respondents, the consequence would be, as was said by Lord *Ellenborough*, C. J., *Bayley*, J., and *Abbot*, J., in *Harvey v. Crickett*, 5 M. & S. 343, "That, upon an act of bankruptcy being committed by one partner, the partnership must stop, and the solvent partner be ruined in the midst of plenty."

Upon decision a solvent partner has, after the bankruptcy of his co-partner, dominion over the partnership property. *Fox v. Hanbury*, Cowp. 445; *Smith v. Oriel*, 1 East, 368; *Harvey v. Crickett*, 5 Maule & S. 342; *Coldwell v. Gregory*, 1 Price 129, from which cases it will appear that a payment made by a solvent partner after an act of bankruptcy by his co-partner is valid.

But the question now under consideration is, not as to the dominion of the solvent partner over partnership property, but merely as to the right of a *bond fide* creditor to prove against the joint estate upon a joint bill of exchange given by the solvent partner for a partnership liability.

If the payment of a debt by the solvent partner is valid, *a fortiori*, therefore, the solvent partner may, for the same purpose, draw or accept a bill; and so it is decided by *Lacy v. Woolcott*, 2 D. & R. 460; *Ramsbottom v. Lewis*, 1 Camp. 278; *Craven v. Edmondson*, 4 M. & P. 627; 6 *Bingham*, 737, where the case of *Lacy v. Woolcott* is recognized by the Court as law.

It has been said, that by relation there was a severance of the partnership from the time of the act of bankruptcy, and that, after the severance, there was no joint property, and therefore no joint debt could be contracted.

[LORD CHANCELLOR:—A third party, the assignees, having been introduced.]

The fallacy of that argument is obvious, for, if so, there could be no joint estate to be administered under the commission.

Had the bankruptcy not happened, the joint property, or the separate property of each partner, might have been taken in execution under a joint judgment, and the only difference in bankruptcy is, that the right of the creditor is limited upon a joint debt, by compelling him to resort to the joint estate, which the assignees must keep distinct, to satisfy the joint debts. The joint property continues the same in the hands of the assignees as it was before the bankruptcy. That there is not any such severance will, however, appear from the cases already cited.

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It has been said, that there is a difference between transferring property and creating a liability. It is true that, previous to the passing of the 49 Geo. 3, c. 135., s. 2, a debt contracted after an act of bankruptcy was not proveable; but by that statute the party must have notice of the act of bankruptcy at the time of giving credit, to affect his right; and the law is the same in cases of set-off. *Hawkins v. Whitten*, 10 B. & C. 217; *Dickson v. Cass*, 1 B. & Ado. 355.

And again, by sect. 82, all payments *bond fide* made by or to any bankrupt are valid, notwithstanding a prior act of bankruptcy, "provided the person so dealing with the bankrupt had not at the time of such payment notice of such act of bankruptcy." Such is the spirit of the whole statute. (a)

Upon the whole, therefore, it is submitted, that the judgment of the Court of Review is erroneous, and that the appellant is entitled to prove against the joint estate.

Mr. *Swanston* and Mr. *Montagu* for the respondents:—

The argument for the appellant has not been addressed to the specific question before the Court; and the various cases cited are wholly inapplicable to the real question. It is not, whether the solvent partner has dominion over the partnership effects after the bankruptcy of his co-partner, nor is it as to any personal liability of the parties, nor is the question, whether the appellant is entitled to prove, but against what estate he is so entitled.

(a) See sections 81, 84, 88.

As to the cases which have been cited to shew that the partners would be personally liable, or that the solvent partner is authorized to deal with the partnership property, they are inapplicable to the present case, as the only question now under consideration is, whether, after the bankruptcy by one partner, his co-partner is competent to create a new liability by a bill of exchange upon which a proof can be made against the joint estate; and it has been contended that he is. But there is not any case to warrant such a proposition. It is true that most of the decisions opposed to this proposition are the dicta of Judges at *Nisi Prius*; but they have been so little doubted, that it does not appear that any have been brought under the consideration of the Court in Banco.

It may be admitted that, in the case of an existing partnership, the joint estate would be liable; but in the present case there was no existing partnership; and the assignees had, by relation, become tenants in common with the solvent partner, of the partnership property; and the question is, whether he can bind himself and the assignees.

But a solvent partner cannot so bind the estate of himself and the assignees. *Kilgour v. Finlayson*, 1 *H. B.* 155; *ex parte Ruffin*, 6 *Ves.* 119; *ex parte Wait*, 1 *J. & W.* 605; *Dutton v. Morrison*, 17 *Ves.* 197; in which case Lord *Eldon* says, "It is not the property of *A.* and *B.*, but the joint property of *A.* and the assignees of *B.*

In *Kilgour v. Finlayson*, 1 *H. B.* 155, it was decided that a joint liability cannot be created if there is no joint interest in property upon which liability can attach.

In *Abel v. Sutton*, 3 *Esp.* 108, it was decided by Lord *Kenyon*, that, after the dissolution of a partnership, one of the persons who composed the firm cannot put the

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partnership name on any negotiable security, even though such existed prior to the dissolution, or was for the purpose of liquidating the partnership debts, notwithstanding such partner may have had an authority given him to settle the partnership affairs; and in *Wright v. Pullen*, 1 *Star.* 375, Lord *Ellenborough*, following Lord *Kenyon*, decided, that where, after the actual dissolution of a partnership, one member accepted a bill in the partnership name, bearing date before the dissolution, an indorsee, who takes the bill without notice of the dissolution, could not enforce the bill against the other member.

That a dissolution by bankruptcy is, by relation, from the time of the act of bankruptcy, when followed by a commission and assignment, is established by a variety of cases. *Fox v. Hanbury*, *Cowp.* 450; *Smith v. Oriel*, 1 *East.* 308.

Lacy v. Woolcott, 2 *Dow. & R.* 460, has, however, been chiefly relied upon; but that case does not warrant the proposition contended for by the appellant. It was decided upon a different ground. The bankrupt partner and the solvent partner had, after the act of bankruptcy, recognized their liability, by holding themselves out as partners; and in that case the question was not as between creditors.

It is submitted, therefore, that it is not competent for a partner, after dissolution by bankruptcy, to create a liability upon which proof can be made against the joint estate.

Sir *Edward Sugden* in reply :—

It is admitted, that if the bankruptcy had not happened the partners would have been liable; but it is said that a solvent partner cannot make the estate of

himself and the assignees of the bankrupt liable for a subsequent debt. But here that question does not arise; for the bill was given for a pre-existing joint demand in pursuance of a previous engagement. But it is contended that this joint creditor cannot follow the joint property, because the bill was accepted after the act of bankruptcy of one partner; and *Kilgour v. Finlayson (a)*, *ex parte Ruffin (b)*, and more particularly *Dutton v. Morrison (c)*, have been relied on; but those cases were before the 49 Geo. 3, c. 135.; since which statute the rights of a party can only be affected by notice of the act of bankruptcy. It is not pretended that it is not a valid debt, but it is said that the right of proof does not exist; and it is admitted that a solvent partner might deal with the partnership effects. But if he may deal with the property, why may he not accept a bill?

As to *ex parte Ruffin (b)*, and the cases of that class, they merely decide, that, if property is transferred by the old to the new firm, the creditors of the old firm have no right in preference to the new creditors.

With regard to the equity of the case, it has been said that the question is to be considered the same as if it were with *Davies*. But not so; for whatever equities might have existed as against *Davies*, they cannot affect the right of *Robinson*, who took the bills in regular course of business, without notice either of the bankruptcy or of any equities which might have existed. If the doctrine contended for by the assignees is right, there cannot be any dealing with any partnership without instituting enquiries whether one of the partners may not have committed an act of bankruptcy.

The appellant is, therefore, entitled to prove, and the decision of the Court of Review must be reversed.

Curia advisare vult.

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(a) 1 H. B. 155.

(b) 6 V. 119.

(c) 17 V. 197.

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LORD CHANCELLOR:— The question which arises here is of great importance, and is one on which conflicting dicta, rather than decision, are to be found in the books. It is, whether or not a solvent partner in a firm, one of whom had committed an act of bankruptcy, can bind the firm by his acceptance for a partnership debt, the acceptance being, by indorsement, in the hands of a *bond fide* holder for value, without notice of the act of bankruptcy.

The firm of *Houghton* and *Watts* were liable to *Davis*: and, after *Houghton* became bankrupt, *Watts*, cognizant of his bankruptcy, gave *Davis* the acceptance of the firm, which he, *Davis*, indorsed to *Robinson*. *Watts* afterwards became bankrupt, and a joint commission issued, under which *Robinson* sought to prove against the joint estate. The commissioner before whom the point was raised allowed the proof; the Court of Review ordered it to be expunged; and the question comes here on a special case, stating in effect the case which I have now given in substance.

It must be admitted that the consequences would be most unfortunate were it still to be the law, that the *bond fide* holder of a bill accepted by a firm could not prove on it, if it turned out to have been accepted after a secret act of bankruptcy committed by one of the partners. The extent to which this position is put, and its mischievous tendency, need not be pointed out.

The ground of the decision below appears to have been, that the bankruptcy dissolving the partnership, the assignees are, by relation, tenants in common with the solvent partner, from the act of bankruptcy; so that nothing done by the solvent partner, without the concurrence of the assignees, can, from that event, bind the joint property. In the very short note of the reasons given by the learned Judges below, that is the

ground of the judgment. But from thence another inference of a wholly different nature must be made, before the present case can be decided as their Honors have determined, namely, that because of the tenancy in common the solvent partner cannot bind the property of the firm, therefore he cannot render the firm liable by his contracts with parties ignorant of the dissolution and bankruptcy, even although those contracts relate to prior liabilities of the firm.

That bankruptcy dissolves a partnership when a commission issues, and there is an adjudication and assignment, and that the cesser of the partnership connection takes place from the act of bankruptcy by relation, as a general position, is unquestionable; but that it has every effect of a dissolution; that it determines the partnership by relation to all intents and purposes, and makes it as if no such connection had ever subsisted, is not law. The dissolution being unknown to the world, all men are safe in contracting with the firm. No one can doubt, that if two parties secretly agree to dissolve on the 1st of January, entering into a regular instrument of dissolution, and yet go on trading together as before, either may validly bind both on the 1st of February, by accepting a bill in the partnership name, and paying it away to a party ignorant of the dissolution. Does the circumstance of the dissolution having been effected by bankruptcy make any difference in the position of the *bona fide* and ignorant holder? The case, as decided below, can only rest on the supposition that this does make a difference, by letting in the assignees as tenants in common of the solvent partner. But suppose them so as regards the property, it does not prove their being let in prevents the solvent partner from binding the firm, by con-

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tracting a new liability for an existing debt of the firm. Suppose there had been no partnership at all, that the bankrupt had been a sole trader, had accepted the bill himself, and had paid it to one ignorant of his having committed an act of bankruptcy, it is clear that the holder could have proved. The bankrupt could not have validly transferred property after his act of bankruptcy, unless within the statutory exception. He could not have indorsed the acceptance of another person, so as to give his indorsee an action against the acceptor, but he could bind himself, the indorser, by that indorsement, in case the bill were dishonoured; and his acceptance would certainly bind him in the hands of an innocent holder, and entitle such holder to prove under his commission. It can make no difference, that the acceptance is by the solvent partner of a firm, and not by the bankrupt himself; the acceptance binds both, unless the bankruptcy is known. The indorsement by *Davis to Robinson*, in this case, puts him in the position which I have been assuming. The party receiving the bill stands in that of the innocent holder, if it be clear, which indeed cannot for a moment be questioned, that, on a secret dissolution without bankruptcy, an innocent holder of the partnership acceptance given by one partner could sue both. But ought the bankruptcy, which takes one partner out of the firm, to place that innocent holder in a worse situation, or ought it to place the assignees of the partner going out in a better situation, than he could himself have been in? It might rather be contended the other way, at least that there is a reason more in favour of the holder, where the secret act does not complete the dissolution, than where the dissolution is completed before the acceptance was given; for in truth the act of bankruptcy is only an inchoate dissolution, to

be perfected by the assignment under the commission ; and it would be difficult to show why a party, who takes the acceptance of a firm during the interval between the inception and the completion of the severance, and at a time when events might perfect their completion altogether, should be in a worse situation than if he had taken it after the severance was completed, and the partnership wholly determined.

If we look to the cases we shall find, that while there are none directly against the view which I take of this question ; while at law there is no case either directly or indirectly against it, and while there is a current of authority plainly in its favour, yet there are one or two cases which proceed upon principles not easily reconcilable with others of high authority and recent date. The only case in Banc that I know of, which materially differs from *Harvey v. Crickett*, 5 M. & Sel. 337, is that of *Thompson and Freere*, 10 East, 418, where it was held, that an indorsement by two partners, after acts of bankruptcy committed by them, did not transfer the partnership interest in an acceptance, separate commissions having afterwards issued against them, and the solvent partner being abroad, and ignorant of the whole transaction. It must, however, be observed, that in this case the Court only granted a rule for a new trial, being of opinion that the facts were not well ascertained, and that some of the matters of law which the case involved required more deliberate consideration. It does not, however, appear ever to have been afterwards brought under the notice of the Court, although the reported case has been again and again referred to, and particularly was urged on the Court as an authority in *Lacy and Woolcott*, 2 Dow. & R. 460, without effect, as it did not bear directly on the point then before the Court.

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Then the decisions in *Dutton* and *Morrison*, 17 *Vesey*; 197, in the matter of *Wait*, 1 *Jac. & Wal.*, 605, are relied on, as evincing a disposition to question the principles of the latter cases at law, and as authorizing a different distribution of the partnership estate from that to which those cases would lead. But it must be observed, that Sir *William Grant*, in *Brickwood v. Miller*, 3 *Mer.* 275, appears to have thought the principle was carried too far in *Dutton* and *Morrison*, as it should seem from his observations, particularly stated in page 281; and, at any rate, that the cases, as well here as at *Nisi Prius* and in *Banc*, are reconciled, if not with each other, certainly with the opinion which I have formed on the present question, by the distinction which may, if necessary, be taken, between acts assuming to transfer the property of the firm, and making a contract by acceptance for a previous debt of the firm. And it is perfectly consistent with the proposition, that the solvent partner cannot validly transfer the partnership property after the bankruptcy, to maintain that he may validly bind the firm by his acceptance given to a party ignorant of the bankruptcy. So that it is no impeachment of the proposition, that by indorsing a bill payable to the firm the solvent partner cannot pass that bill, or to hold that by the indorsement he cannot bind the firm. This distinction plainly reconciles *Thompson* and *Freere* with the judgment I have now given, and also reconciles it with *Lacy* and *Woolcott*, 2 *D. & R.* 460; for in *Thompson* and *Freere* the bankrupts were the indorsers, and the bill, though drawn by them, yet was an acceptance of a debtor to the firm; and the question was, whether this indorsement could so operate, because the bankrupt had no longer any power of binding the joint property, from the moment that the assignment relating back has vested the

property in the assignees, as at the date of the act of bankruptcy. It was a question, therefore, not as to the liability of the firm on the indorsement of the two partners, but as to the right of the holder of the bill, which was assumed to be passed by that indorsement — a right, not against the firm, but a right to the bill pretended to be passed by that indorsement. Now it is in nowise inconsistent with this position, or the reasoning on which it rests, to hold that the bankrupt, still more the solvent partner, might bind the firm to an innocent holder, either by passing its own acceptance, or indorsing another person's in favour of that holder.

Then let us consider the cases which bear most immediately on the point in question, and which have never been controverted. In *Fox v. Hanbury*, Cowp. 450. Lord Mansfield held, not only that if partners dissolve a partnership they who deal with either without notice of such dissolution have a right against both, of which indeed there could be no doubt, but further, that after dissolution by bankruptcy the party out of possession of the partnership effects has the same lien on any new goods brought in which he had on the old; and he held, and the Court decided, after full consideration, that the *bond fide* vendee of partnership property by the solvent partner, after an act of bankruptcy committed by another partner, can hold that property against the assignees under a joint commission issued against both. To maintain the doctrine on which my opinion in the present case is founded there is no occasion to go so far, because the question here only relates to the liability of the partnership from the contract of the solvent partner, and not to the title given by him in the partnership property. But that the decision of the present case is involved in that determination of *Fox and Hanbury*, as the lesser is in-

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volved in the greater, and that the judgment in review cannot stand along with that, can admit of no doubt. But the later case of *Lacy v. Woolcott*, 2 D. & R. 460, appears to have been before the Court below, and was cited by one of the learned Judges there when the case first came on, but respecting which I find no mention either in the judgment or in the report, except a statement by the counsel endeavouring to distinguish that case from the case at bar, and which case seems to have been treated as if it were of no authority, though it was a case most deliberately and solemnly adjudged, and decided without the least hesitation by the Court of King's Bench. The late case of *Lacy v. Woolcott*, 2 D. & R. 460, was in truth a decision of the very question in this present case, the only difference being, that there the bankrupt and here the solvent partner gave an acceptance, and that there it was given for a debt of the bankrupt wholly unconnected with the partnership dealings, and here it was given for a partnership debt; differences which, as far as they go, most clearly render that a stronger case than this against the title of the holder. It is observable that the Court of King's Bench in *Lacy v. Woolcott* had the matter before it on a special case. The point had been raised at the time, and the matter put into this shape for the sake of a more solemn determination, and the Court had no doubt or hesitation on the subject, stopping the counsel who were to have argued on the other side. *Thompson v. Freere*, 10 East, 418, was cited as well as *Ramsbottom v. Lewis*, 1 Camp. 278; and the answer given by the Court so lately in that case proceeded exactly on the distinction which I have here stated; and it will be observed that their decision has never been questioned, but as I understand has been acted upon at Nisi Prius, and is certainly

referred to as a recognised authority in a later case in the Common Pleas, I mean *Craven v. Edmondson*, 6 Bing. 737. So that the distinction which I have taken reconciles the authority of the *Nisi Prius* case of *Ramsbottom v. Lewis*, 1 Camp. 279, and *Abel v. Sutton*, 3 Esp. 108; for in each of these the question was touching the effect of the solvent partner's act in transferring the partnership property, that is, the interest of the firm in bills of exchange, after the bankruptcy of one partner. Next to *Lacy v. Woolcott*, 2 D. & R. 460, *Harvey v. Crickett*, 5 Maule & S. 342, is the most important case in every respect on the present question; for although the point which arises here was not expressly decided there, yet the principle of that case plainly governs this, and indeed goes beyond the question on which the present judgment rests; and the doctrine stated by the learned Judges, who gave the subject much consideration, is altogether applicable to the question before us. The difference, and the only one, is this: here the solvent partner assumes to bind the firm by an acceptance in the partnership name given to a creditor of the firm; there the solvent partner indorsed in his own name, to a partnership creditor, a bill drawn by a debtor to the firm, and made payable to the solvent partner; but the bill was drawn after the bankruptcy of the other partner, and was for a debt due to the partnership, and it was made payable to the solvent partner purposely, and upon the supposition that upon the failure of the other every thing devolved to the one that remained. The case was therefore treated as one of a solvent partner disposing of partnership property, not assuming to bind the firm; but I see no distinction in principle between the two cases, where the solvent partner only assumes to bind the firm for value for a debt before existing, and gives a negotiable security for

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an antecedent liability of the firm contracted before the act of bankruptcy. The observations of *Bayley, J.*, that if the power of the solvent partner ceased on the bankruptcy of another the house must close at once, and that the rights of the bankrupt passing to his assignee does not prevent the remaining partner from applying partnership property in satisfaction of partnership debts; and the observations of *Best, J.*, that, if it did, the solvent partner might be ruined in the midst of plenty, are clearly applicable to the present question. Those observations, going beyond what it is necessary to go, are not quite reconcileable with some of the other cases; but on the decision of the case itself it cannot be doubted that the Court held the acts of the solvent partner binding on the firm, for he was permitted to transfer by indorsement the chose in action and partnership credit, and to bind, not merely his own undivided moiety, but also the moiety belonging to the bankrupt partner, that is, belonging to that partner's assignees. Had he indorsed the name of the firm, and had the bill not been paid by the drawer and acceptor, could the same Court which decided in favour of his right to transfer the security have denied that the holder of the bill had a right to go against the firm? Yet that would have been precisely this case. Then what is the difference between holding that a solvent partner can pay a partnership debt by transferring the credit of the firm, and holding that he can pay the same debt by giving a security which entitles the creditor or his transferee to go against that property, and it may be the credits of the firm? It must however be observed, that if, as is generally supposed, and as the argument of the learned Judges, particularly of *Bayley, J.*, entitles us to believe, *Harvey v. Crickett*, 5 M. & Sel. 342, went the length I have been assuming, it goes a great deal further

than is necessary to support the view I take of the present question; for although the solvent partner had only the power of binding his own share of the partnership property, yet he might still, on the principle of that case, and on the general ground already stated, have the power of binding the firm by acceptances, for partnership liabilities given to a holder without notice of the bankruptcy. *Harvey v. Crickett*, in the full extent to which it goes, is not perhaps quite reconcilable with some earlier cases, particularly those at *Nisi Prius* to which I have referred, *Abel v. Sutton*, and *Ramsbottom v. Lewis*, but its principles have not been since shaken; and I do not see how, on these principles, the decision in *Lacy v. Woolcott* could stand, if the judgment of the Court of Review in this case be right.

On the whole, whether I regard the general principles which regulate partnership, or those of the bankrupt law, or the authority of the decided cases when narrowly examined, I have no more doubt how the law on this question stands than I should have, upon principle of the highest expediency, how the law ought to be, if we were now at liberty to enter upon such an enquiry. The decision is, that the petitioner has a right to prove; and the Court of Review ought not to have expunged his proof.

This only determines that the solvent partner can bind the firm by his acceptance passing to a holder ignorant of his co-partner's bankruptcy, and has no bearing on the power of that bankrupt to transfer the partnership property. The Court is not called on to deal with that question, in deciding that a *bond fide* holder, ignorant of the bankruptcy, has a right to prove against the estate of the bankrupts.

As this is a question of very great importance, and as there is some conflict even in the language of some of the

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learned Judges, and as the question appears not to have been so fully considered by the Court below as its importance appears to me to demand, I thought it right to consult some of the learned Judges of the highest authority, and particularly those who sat on the decision of some of the former cases at law, and they entertain just as little doubt on the question as I do.

Reversed. (a)

C. R.
May 30,
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Ex parte BURNELL and others. — In the matter of
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If an order, upon a petition by assignees to supersede an invalid commission, does not, through mistake, include the assignees' expences of prosecuting the commission, the error cannot be rectified by a petition of rehearing.
Qy. Whether the petitioning creditor is liable.

A PETITION was presented by the assignees, soon after their appointment, stating that the petitioning creditor's debt was invalid and fabricated, and that the commission was fraudulent, and issued by *Malachy*, the petitioning creditor, not for the benefit of the creditors, but in collusion with the bankrupt, in order to compel the *bonâ fide* creditors to consent to a composition; and that various examinations had been had before the commissioners, with respect to the circumstances, by which the assignees had incurred considerable expences. And it prayed, that the commission might be superseded, and

(a) Since this decision, the case of *Woodbridge v. Swann*, 4 B. & Ad. 633, has been reported, in which it was decided, that if, after a commission of bankruptcy has issued against one partner, the solvent partner, thinking the firm solvent, continue the business, and *bonâ fide*, without contemplation of bankruptcy, pay partnership money into the bankers of the firm, to be discharged of running bills of the firm payable at the bank, and it is so applied, and the solvent partner afterwards become bankrupt, the payment to the bankers is valid *at law*, and the assignee of the two cannot recover the amount in an action against the bankers.

that the costs of and occasioned by the issuing and prosecution of the commission, together with the costs of that petition, and incident thereto, might be paid by the petitioning creditor.

The petition was heard on the 12th of May 1832, when it was ordered that it should be referred to the commissioners to inquire and certify whether, at the date and suing forth of the commission, there was due and owing to *Malachy* a valid and sufficient debt, as petitioning creditor, to support the commission; and, if the commissioners found that the debt of *Malachy* was not sufficient to support such commission, then it was further ordered that the commission should be superseded, and that the petitioners should be at liberty to take out a new fiat upon their own petition, unless within one calendar month, to be computed from the date of the said certificate of the commissioners, another debt was substituted in support of such commission in lieu of the debt of *Malachy*; in which latter case it was ordered, that *Malachy* should pay the costs of the examinations referred to in the petition, and also the costs of all parties of and occasioned by the said application; and, upon the supersedeas of the commission, under the circumstances therein-before mentioned, then it was further ordered, that *Malachy* should pay the costs of such supersedeas and incidental thereto, together with the costs of the examinations, and also of all parties of and occasioned by the application; it was lastly ordered, that if the commissioners should certify that the debt of *Malachy* was a valid and sufficient debt to support the commission, then and in such case the parties were to be at liberty to apply to the Court.

This was a petition by the assignees, stating, that the commission had been superseded, and a new fiat issued by them; that the petitioners were aggrieved by so

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much of the order as directs that, upon the “superse-
deas of the commission under the circumstances herein-
before mentioned, *Malachy* do pay the costs of such
supersedeas and incidental thereto, together with the
costs of the said examinations, and also the costs of all
parties of and occasioned by that application;” and that
the petitioners were advised, that by such order it should
have been directed that, upon the supersedeas of the
commission under the circumstances herein-before men-
tioned, *Malachy* should pay the costs of the supersedeas
and incidental thereto, and all the costs of and occa-
sioned by the issuing and prosecution of the commission,
and also the costs of all parties of and occasioned by the
said application. The petition prayed, that the original
petition might be reheard, and the order varied, by
ordering *Malachy* to pay the costs of such supersedeas
and incidental thereto, *together with the petitioners’ costs,*
charges, and expences of and occasioned by the issuing
and prosecution of the commission, and the costs of all
parties of and occasioned by the said application.

Mr. *Bethell*, for the respondent *Malachy*, objected to
the petition being heard, on the ground that it was a
rehearing for costs.

Mr. *Montagu* and Mr. *Teed* for the petition : —

There is no doubt as to the law, that a rehearing does
not lie for *costs* only. (a) But that rule is only applicable
to a case of rehearing as to costs of the particular pro-
ceeding upon which judgment has been given. This
petition does not ask for a rehearing as to the *costs* of
the original petition, but as to a substantive part of the
prayer of the former petition, which the present order

(a) *Ex parte Arrowsmith*, 14 Ves. 209.

does not embrace, viz. that the expences occasioned to the assignees by the petitioning creditor having improperly issued the commission and of the prosecution may be paid.

In *ex parte Baines*, 1 *Glyn & J.* 259, it was decided, that where the question is not as to the costs of the petition, but out of what fund they shall be paid, a rehearing as to costs will lie. *A fortiori* there may be a rehearing as to expences incurred which were a substantive part of the relief prayed by the original petition.

The order was made by arrangement between the counsel, and it was then supposed that a new debt would have been substituted, and the commission have proceeded; and, if such had been the case, the present order would have fully protected the assignees and the bankrupt's estate, as in that case the petitioning creditor is properly ordered to pay the expences of the inquiry before the commissioners as to the validity of the commission. Indeed, the very principle for which we contend is there recognized, by that provision in the order for indemnifying the assignees in the event of the commission proceeding. Any omission in the order arose from the error of the petitioner's counsel, in supposing that it was sufficient in all events.

The question is, therefore, What ought to have been the order? If the attention of the Court had been called to all the circumstances of the case, it is quite indisputable that the petitioning creditor must have paid all these expences of prosecuting the commission. As soon as the assignees were appointed they caused inquiries to be made; and, as in *ex parte Graves*, 1 *Glyn & J.* 86, the assignees apply instantly upon their discovering that the commission could not be supported. In *ex parte Graves* the assignees made repeated applications by

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letter to the petitioning creditor, requiring him to satisfy them of the validity of his debt and the act of bankruptcy. The commission was superseded, and Lord *Eldon* said, "I shall not be disposed to favour petitions of this nature, unless it be manifest that the assignees have done all in their power before they apply to this Court; but I again say, I am not sorry this discussion has taken place, for it will instruct assignees that their first duty is to satisfy themselves that the commission is well founded."

In the present case the assignees did all in their power before they presented the petition, by examining minutely the petitioning creditor, and all the circumstances, before the commissioners. In doing this they have necessarily incurred great expence; and it surely will not be contended, that assignees are not to be indemnified for expences necessarily and properly incurred in the prosecution of the commission. They have only taken a reasonable time for inquiry, and then applied instanter. That the petitioning creditor is liable to all costs and expences cannot be doubted, in a case of fraud, as is the present; and such was the usual order when a commission was superseded for concert.

We submit, therefore, that the general rule, not to rehear for costs, is inapplicable; and that the order ought to be amended as prayed.

Mr. *Twiss*, for the co-assignee of the petitioner, cited *Jenour v. Jenour*, 10 *Ves.* 562, where, upon an appeal as to costs, they were considered by Lord *Eldon* as relief prayed, and therefore not within the rule against appealing for costs only. *Owen v. Griffith*, 1 *Ves.* 250, of which the marginal note is, "The rule that no appeal lies for costs merely not to be strictly adhered to, if a sound distinction can be made, as where a fair incum-

brancer is decreed only his principal and interest." And the Lord Chancellor said, " Here the appeal for costs affected the merits of the case, the justness of which is on the defendant's side."

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The CHIEF JUDGE: — If this case were now before the Court for the first time, and the question had been, Whether the petitioning creditor should pay all the costs and expences necessarily incurred by the assignees in prosecuting the commission? I should have said that he was liable, and that the assignees should be indemnified. But this is a rehearing, to which there are two objections: 1st, That there cannot be a rehearing as to costs; and, 2dly, That the order was made by arrangement of the parties, by which they are bound. And I think that this application is too late, for I do not see any difference between the costs of the petition and the costs of the proceedings under the commission. It appears to me that the costs of prosecuting the commission were incidental to the main question, which was decided, and the Court will not open the main question for the purpose of setting right any question of costs. In *ex parte Baines*, 1 G. & J. 259, the Vice Chancellor said, that he was of opinion that the petitioner could not correct a former order in respect of costs, by a separate petition as to costs only. No case has been produced, except where the question has been, Whether the costs were to come out of one fund or another?

It is of more consequence that the general rule should be abided by than that we should take into consideration the circumstance of the hardship of the particular case.

Sir John Cross: — I am always anxious that general rules should not be set up to defeat the justice of a particular case. But on the present application that justice will not be defeated.

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 of
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Twelve months ago the petitioners, for themselves, instead of taking the whole prayer of their petition, agreed to the terms of the order of which they now complain. The order was drawn up and acted upon by them, and now they desire it should be amended. If the application had been made whilst it was in minutes, and there appeared any error, it might have been rectified, as the record might at common law during term. I have confined my attention to the question of the expediency of permitting such an application after the lapse of so much time.

Sir *George Rose* : — I concur that a petition cannot be reheard as to costs. But considering the substance, I think that the order embraces all the rights of the parties. The original petition was one which was looked at with the greatest jealousy, and the Court has always required the application to be made instantaneously. That petition did not allege any special circumstances of loss or of costs which the petitioners had incurred in prosecuting the commission. Supposing the order could now be opened, they would not have got the costs of the examination of the petitioning creditor, which they have by the order. Nothing will be looked at with more jealousy than assignees coming to supersede, which was countenanced by Lord *Eldon* with much reluctance. (a)

If any damage has been incurred by the assignees, in consequence of the conduct of the petitioning creditor, they may, upon special circumstances, be entitled to recover in an action, or in this Court upon a proper petition presented for that purpose.

Petition dismissed with costs.

(a) *Ex parte Graves*, 1 G. & J. 86.

Ex parte WILLMENT.—In the matter of
WILLMENT.

C. R.
Nov. 5,
1833.

THIS was an application to tax a messenger's bill, which had been paid in 1828, upon the ground that it contained a fraudulent charge of 37*l.* 15*s.*, for keeping a box of papers belonging to the bankrupt's estate for five months.

After the lapse of five years a messenger's bill cannot be taxed, without a charge of fraud lately discovered.

Mr. *G. Richards* objected, that the application was too late.

Mr. *Rogers*, in support of the petition, said, that the delay had arisen from the default of the solicitor, to whom the petitioner, in 1828, upon receipt of the bill, had given it, who neglected to proceed in obtaining its taxation; that the petitioner had had great difficulty in obtaining the bill from the solicitor, to whom he had made numerous applications; and he contended, that in a case where the fraud was so apparent the Court would now interfere; and cited *ex parte Neal, Buck*, 111.

Per Curiam: — Too long a period has elapsed, and there is no allegation in the petition of any fraud which the petitioner had not long since discovered.

Dismissed with costs.

C. R.
Nov. 6,
1833.

A renewed fiat must be taken out by or in the name of a creditor for 100*l*.

Ex parte MAUDE. — In the matter of HUDSON.

THIS was an application, on behalf of a creditor, for a renewed fiat.

Sir *George Rose* said, a renewed fiat could only be issued upon the petition of a creditor or creditors whose debt would be sufficient to support an original fiat.

The Court, therefore, ordered the renewed fiat to issue, if the debt of the petitioner were sufficient, but if not, he was to be at liberty to use the name of any creditor whose debt was sufficient. (a)

Ex parte NOTLEY. — In the matter of NOTLEY.

C. R.
Nov. 12,
1833.

If money be advanced to a trader, to enable him to commence a trade, of which the lender is to share the profits, it is a good petitioning creditor's debt.

Such debt may be proved.

IN November 1832, *Notley*, the petitioner, was about to establish a chocolate manufactory, for which he required capital; and an application was made to *Emma Briggs*, who agreed to advance 230*l*., upon the petitioner giving her a bond and warrant of attorney for securing the repayment with five per cent. interest. Judgment was

(a) 6 Geo. 4. c. 16. s. 20. "If, by reason of the death of commissioners, or any other cause, it becomes necessary, any commission may be renewed, but only half the fees usually paid upon obtaining commissions shall be payable for the same." Such are the words of the statute.

Q. 1. If the bankrupt required the signature of

the commissioners to his certificate, or if he were injured, could he not renew?

Q. 2. If an assignee is not a creditor, can he not renew?

Q. 3. If a creditor for 90*l*. were injured, could he not renew?

entered up forthwith, but payment was not to be required until 1837.

The petition stated, that *Briggs* was to have one eighth of the profits to arise from the trade, which the petitioner then commenced; and that in pursuance of the agreement the petitioner paid to *Briggs* 5*l.* per month, from the 7th day of January to the 7th day of July, being the estimated amount of one eighth of the expected profits.

The fiat was issued by *Briggs* upon the debt due to her in respect of the advance.

This petition was by the bankrupt, and prayed that the fiat might be annulled, on the ground that the debt upon which it was issued arose out of partnership dealings between the parties.

Mr. *Montagu* and Mr. *Lovatt* for the petition:—The debt upon which this fiat is attempted to be supported arose out of the partnership, being an advance of capital for its formation. For such was the essence of the contract between these parties. (a)

(a) *Ex parte Nokes*, June 1801, 2 *Montagu* on Bankruptcy, p. 148.

Petition by the bankrupt to supersede the commission, on the ground that there was not a good petitioning creditor's debt.

The petitioning creditor was a partner of the bankrupt; the debt was above 100*l.*, but there had been no statement or balance of the accounts.

Romilly, for the bankrupt, contended, that, as no action could be maintained at law for

this debt, it would not support the commission.

Mr. *Mansfield* and Mr. *Cooke*, *contra*.

Lord *Eldon*.:—I do not know of any case, and I am strongly inclined to think, when a partnership is subsisting, and there is no liquidation of the accounts, though there is actually a balance of above 100*l.* due to one partner, that he cannot upon such debt support a commission; but had the partnership been determined, and had the solvent part-

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[*Sir George Rose* :—This appears to be a distinct debt, for which an action might have been brought notwithstanding any partnership. If upon the formation of a partnership one partner advance money to another partner to enable him to embark in trade, it is as distinct as if they were not partners. Here the money was advanced upon security of a bond in the common form, reserving five per cent. interest, and of a warrant of attorney upon which judgment has been entered up.]

It is true that in the bond there is nothing respecting partnership, but *dehors* the bond this agreement for a participation in the profits was made. If, therefore, the money was not advanced as capital, it is clear that the object of the lender was to obtain more than five per cent. interest. The agreement, therefore, either created a partnership or was a usurious contract.

[*Sir John Cross* :—The agreement for participation in the profits may create a joint liability as to third parties, but there is no evidence of a partnership as between themselves. A creditor may insist on the joint liability, but can a debtor turn round and say to his creditor, “although contrary to our contract, yet, as the law makes us partners, you shall not recover your debt.”

Sir George Rose :—Assuming the fact of partnership to be established, it would only exist as in favour of third parties, whether the advance were as capital or not. But the petition does not allege that it was advanced as capital, being confined to a statement of this being a partnership created by a participation of profits. There are many cases proving that, even as between partners, one may lend a sum to another by which a legal obli-

ner paid all debts, I should think to the fact, it was referred to the that he might sustain the com- Master.
mission.

There being some dispute as *Windham v. Paterson*, 1 Starkie, 144; *Matson v. Barber*, 1 Gow. 17.

gation would be created. In this case there is not only a bond, but a judgment, and although it was not to be acted on until 1837, yet by the bankruptcy that time has, by anticipation, arrived, and the commission is only in the nature of a statutable execution. Then as to usury, how can the party come here to avail himself of such an objection, except upon the equitable terms of paying principal, interest, and costs? Besides, usury is not alleged in the petition.]

The only method which one partner has of enforcing rights against another is by filing a bill. If a sum of money is advanced by one person to another, for the purpose of forming a business in which they are to be jointly interested in the profits, it is clearly a debt arising out of the partnership, the very essence of the contract being the formation of a partnership; and such a debt will not support a commission. *Windham v. Patterson*, 1 *Stark*. 144.

[*Sir G. Rose* : — There is no express contract for a partnership in this case. If it exist, it is merely by operation of law.]

Mr. Swanston, for the petitioning creditor, was not called on.

The CHIEF JUDGE : — Some disputed facts as to the original agreement are not clearly before the Court; but it is unnecessary to direct any further inquiry as to those facts, if they would not vary the material parts of the case. The undisputed facts are shortly as follow : *Briggs* advanced the money on a bond and warrant of attorney for securing repayment, with interest at five per cent., in 1837; which money was to be employed by *Notley* in his trade. It is said, that this is not a good

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petitioning creditor's debt, as there was, *dehors* these written documents, an agreement to share the profits of the trade, and therefore this debt must be considered as arising out of the partnership. But that is not so; it is only when it is necessary to take the partnership accounts to ascertain the amount of the debt that it can be said to arise out of the partnership, so as to deprive the creditor of his legal right. It has been determined that, in the case of a partnership, if there has been an account rendered and a balance struck, the same might be proved under a commission. So it may support a commission. The cases in which the objection of the existence of a partnership has been taken are those in which money is actually brought into the partnership accounts as between the partners, and where it would depend upon taking the accounts whether the sum were due or not. But here the money is to be repaid at all events. It was merely a loan from one individual to another, and therefore it is a sufficient debt to support the fiat.

Sir John Cross : — There is no evidence of a contract or agreement for partnership as between the parties themselves. If *A.* undertake to give *B.* a share of profits, as to creditors, both may be liable as partners; but a party cannot say, "by operation of law you are my partner;" there is no ground at law or in equity to entitle this bankrupt so to turn round upon his creditor. But even if there were a partnership, I think this was not a debt arising out of partnership.

Petition dismissed.

Ex parte PRICE. — In the matter of PRICE.

Nov. 13,
1833.

THIS was a petition for leave to prove, which stated, that when the petitioner attended before the commissioners they rejected his proof, all but 20*l.*, on the ground, as petitioner understood, that the entries in his accounts were made recently, and for the purpose of making himself appear a creditor. The petition prayed the costs of this application.

The costs of a petition to prove must be paid by the creditor if he adduces new evidence. If he succeed on evidence which was tendered before the commissioner and rejected, it seems he might be entitled to costs.

Affidavits were filed in verification of the account, which established the case of the petitioner; and the question which then arose was, whether the commissioners had altogether rejected the proof, or had ordered it to stand over till further evidence was produced.

Mr. *Swanston* and Mr. *O. Anderdon* for the petitioner having opened the case, the Court interposed.

Per Curiam: — It appears that the commissioners stated they were not satisfied with the proof adduced, and required further evidence. On the part of the petitioners it is insisted that such further evidence was tendered, but refused. The respondents deny this; and, on examining the proceedings, no memorandum appears of any further evidence having been tendered. Under these circumstances, the proper course would appear to be to refer it back to the commissioners, in order to give the petitioner an opportunity of producing his further evidence. As to the costs of this petition, they would depend upon the fact whether the evidence was or was not tendered; and the affidavits being contradictory on that point, the commissioners should certify to this Court what actually passed on the former occasion. These are only observations thrown out for the consideration of counsel.

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Mr. Swanston and Mr. O. Anderdon : —

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A certificate from the commissioners is wholly unnecessary, it being distinctly sworn by four persons that further evidence was tendered and rejected; and the denial of this is merely by the affidavit of the solicitor of the assignees, which in effect amounts to no more than that he has no recollection that other witnesses were produced. As to costs, they ought to be allowed, because this proof was rejected so improperly as to form one of the exceptions to the general rule, that costs are not given against a decision of the commissioners. (a)

Mr. Griffith Richards and Mr. Bacon for the respondents : —

When the petitioner tendered his proof before the commissioners they required evidence in its support; he thereupon produced his books, when all the entries constituting the items of his claim were discovered to be entered together in one place, which the commissioners thought so suspicious that they required further evidence; and there the matter rested, for none was produced.

The CHIEF JUDGE : — It appears to me that the petitioner has established his right to prove, by the affidavits in support of his petition. The question therefore resolves itself into this, who is to pay the costs? No rules are clearer or better established than those which lay down that, when, in cases like the present, the assignees support the decision of the Court below, they take their costs out of the estate, unless a case of suppression of evidence is made out; and that a party who succeeds in this Court against a decision of the commis-

(a) *Ex parte Fiske*, 1 Mont. & Mac. 93.

sioners must pay his own costs. This latter rule may sometimes bear hard upon petitioners, but it would be equally a hardship to make the estate, that is the other creditors, pay for an error in judgment of the commissioners. If the petitioner had made out the fact that he did actually tender further evidence, which was refused, that might perhaps entitle him to costs out of the estate, but that is not satisfactorily proved. This proof is therefore allowed upon the affidavits of witnesses not proved to have been tendered in the Court below; and there can be no reasonable doubt, that, if they had been examined before the commissioners, this proof would not have been by them rejected. The petitioner must therefore pay his own costs.

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Sir John Cross : — I concur in what has fallen from the Chief Judge. As I have heard it questioned whether a petitioner may support his evidence in this Court by further or other evidence than that tendered before the commissioners, I wish to observe that it is quite settled that he may do so, but that the consequence usually will be, that, though successful, he must pay the costs. If, in the case now before us, the evidence now produced had been before the commissioners, and they had still rejected the proof, I am of opinion that we ought to have allowed the petitioner his costs.

Sir George Rose : — The petitioner certainly has now established his case, and we have merely to decide who is to pay the costs: as he does not prove the fact of having actually tendered these witnesses to be examined, he must pay his own costs.

Proof allowed.

Costs of assignees out of the estate.

Petitioner to pay his own costs.

C. R.
Nov. 23,
1833.

A supersedeas was applied for, upon consent of all the creditors but one, who died insolvent, and no administration taken out; but his son signed the consent: Held, the supersedeas could not issue without a limited administration for this purpose.

In the matter of HALL.

MR. MONTAGU, on behalf of the bankrupt, applied that the commission might be superseded upon the consent of all the creditors. The Registrar declined giving the usual order, as one of the creditors who had proved was dead, and the consent on his part was signed by his son, who made an affidavit that no administration had been taken out, as he had died insolvent.

Per Curiam: — The Court cannot make the order without the consent of the legal representative; and Sir G. Rose suggested that a limited administration under the statute might be obtained for the purpose of assenting to the supersedeas.

C. R.
Nov. 23,
1833.

Proof by joint estate for fraudulent abstraction, when admissible.

Ex parte TURNER.—In the matter of MACKENZIE and ABBOTT.

IN November 1813 a joint commission issued against *Mackenzie and Abbott*.

Mr. Commissioner Fane admitted a proof for 1,557*l.* 10*s.* 1*d.* on behalf of the joint estate against the separate estate of *Mackenzie*, on the ground that he had fraudulently abstracted that amount from the partnership funds.

This was a petition to expunge the proof.

From 1811 till July 1813 *Abbott* and *Mackenzie* were in copartnership as merchants. Previous to the commencement of the partnership *Mackenzie* was in-

debted to various persons, which debts he was to discharge out of his private effects. According to the terms of the partnership *Abbott* and *Mackenzie* were respectively authorized to draw sums from time to time from the joint funds by way of maintenance, not exceeding 700*l.* a year. In December 1812 *Abbott* discovered that *Mackenzie* had withdrawn bills to the amount of 2,700*l.* from the joint stock, which he had not entered in the books, but had applied to his own private use, contrary to the terms of the copartnership. Immediately after the discovery, *Abbott* remonstrated with *Mackenzie* upon the great impropriety of his conduct, upon which *Mackenzie* promised he would replace the amount as soon as assets of his private estate should come to hand from the Baltic, West Indies, and other parts; subsequent to which time *Mackenzie* went to the island of Teneriffe, to collect some property consigned by the partnership to that island; and during his absence his wife and family were in great distress, and, from motives of humanity, *Abbott* allowed her small sums of money for the subsistence of herself and family. No sums of money were ever repaid to the copartnership to replace the sums abstracted. *Ogg*, the clerk to the bankrupts from the commencement of their partnership till the issuing of the commission, deposed, that upon settling the account of the partners it appeared, that after giving credit to *Mackenzie* for various sums paid in by him to the partnership account, he had drawn 3,015*l.* 16*s.* 9*d.*, from which deducting 1,458*l.* 6*s.* 8*d.*, the amount allowed to be drawn by the articles from the commencement of the partnership to 1813, the date of the commission, there remained 1,557*l.* 10*s.* 1*d.* overdrawn by *Mackenzie*; that part of the sum of 3,015*l.* 16*s.* 9*d.* consisted of the three

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bills of exchange of 1,000*l.*, 1,000*l.*, and 700*l.*, upon Messrs. *Graham*, belonging to the partnership, which *Mackenzie* in December 1812 discounted, and applied the proceeds to his private use; that he believed the three bills were withdrawn without the knowledge or consent of *Abbott*; that at the time of the conversation between *Abbott* and *Mackenzie*, no entry of the transaction had been made in any of the books of the partnership, but *Abbott* discovered the same from not seeing the bills in the bill drawer; that it was the duty of the partners, or either of them, on disposing of any bills belonging to the firm, to enter in the bill-book of the firm the manner in which such bills had been disposed of; and that there was no entry in the bill-book of the disposal of the three bills so abstracted by *Mackenzie*.

Mr. *Swanston* and Mr. *Marshall* for the petition:—
The question is, whether there was any fraud. Even if there were fraud in the original abstraction of the three bills, it has been waived by the subsequent dealings between the partners in the same manner as before the discovery of the abstraction. The sums said to be abstracted were entered in the books, by which the presumption of fraud is rebutted, *ex parte Smith*, 1 G. & J. 74; and *Mackenzie* continued as partner, and was afterwards allowed to draw 460*l.*, part of which *Abbott* paid to *Mackenzie's* wife. The proof was not, however, made in respect of any particular sum abstracted, but upon the balance of the general account between *Mackenzie* and the firm; and the proof must therefore be expunged.

Mr. *Montagu* and Mr. *Purvis* for the respondent:—
It is settled, that if money be fraudulently abstracted

from the joint estate by one partner, a proof may be made for the amount; *ex parte Harris*, 1 *Rose*, 129, 437. And there has not been any act done in the present case to alter the nature of the original transaction, which must be considered fraudulent within the sense in which the word "fraud" is used on these occasions.

It may be admitted, that if the transaction had been duly and openly entered in the books by *Mackenzie* previous to the detection by his partner that the bills had been taken from the drawer, it might have been a strong circumstance to rebut the fraudulent intent, as in *ex parte Smith*, 1 *G. & J.* 74; but such was not the case; and there was no entry made, or communication to the partner, until after the discovery, when he was taxed with the abstraction; and *Abbott* remonstrated with him on the impropriety of his conduct. It is said that *Abbott* has acquiesced by his conduct at the time of the detection, and by the subsequent payments to the wife, and entries in the accounts. The transaction was entered in the books after the detection. It was merely to evidence the extent of the abstraction. Suppose the case of *Fauntleroy*, where the amount of the fraud might probably be 200,000*l.* Upon detection the partners would enter the sums abstracted, not to testify their approbation, but to ascertain the amount. This was done in *ex parte Watkins*, 1 *Mont. & M.* 63, where *Sikes* had in his own name stock belonging to the firm, which he sold out and appropriated to his own use, without the knowledge of his partners; but on the next day, as soon as his partner came to town, he communicated the fact to him, and he was considered debtor for the amount, and charged half yearly with the dividend; and it was decided that it did not amount to subsequent approbation,

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and the proof was allowed. In that case part of the proceeds were actually paid into the firm. If (as it must be admitted it was) at first fraudulent, the question is, what subsequent acts will in law be considered as an acquiescence? In *Sikes'* case the dividends were paid and entered from time to time, and the principal presumed to be returned. The payments to the wife, from motives of kindness, on account of her destitute situation, cannot be termed approbation of the fraud.

The CHIEF JUDGE :—No difference of opinion exists as to the law. It is admitted that no proof can in this case be made, unless the amount were fraudulently abstracted. The question is, whether, if the fraud be proved, subsequent conduct will divest the transaction of its fraudulent character. I am not satisfied that the original transaction amounted to a fraud. It is stated that the entries were not regularly made by *Mackenzie* when he appropriated the bills. It is true that *Abbott* discovered the bills had been taken before any entry was made, but it is not necessarily to be inferred that they were taken in fraud; for as soon as he is asked he admits having taken the bills, and they are entered in the books; and although *Abbott* did not immediately know when they were taken, yet it was known to the clerk, whose duty it was to keep the books; so that *Abbott* had the opportunity of immediate knowledge.

In *ex parte Smith (a)* it was held that the withdrawing money was not a fraud entitling the joint estate to prove, as the transaction was duly and openly entered in the books, by which there was no concealment, the partner having the opportunity of knowing.

(a) 1 G. & J. 74.

If, however, I were satisfied of the fraud in the first instance, I am of opinion that the subsequent conduct would have waived it, and that *Abbott* has approved, not morally, but legally approved the withdrawal of the bills; that he has, by his conduct before the bankruptcy, waived the tortuous act so as to reduce it to an item in the partnership account. It does not appear that any directions were given by *Abbott* not so to treat it. The debt, therefore, is not proveable, and the proof must be expunged.

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Sir *John Cross* : — The first question is, whether the original abstraction was fraudulent? for it is admitted, that, unless it were, the proof cannot stand. What are the facts? Some twenty years ago, a fraud was, it is said, committed upon the partnership. To support a case of fraud, strict evidence is required, and here, the party being abroad, the Court is asked, after this lapse of time, to convict him of the fraud in his absence. It appears that he was entitled, at the time of the alleged fraud, to draw out 1,200*l.*, but he drew out 2,700*l.*, which, it is said, being more than by agreement he was entitled to draw, is a fraud. I concur with his Honor, that the proof ought to be expunged.

Sir *George Rose* : — Upon the principles in equity as to fraud there exists no difference, and this question of fraud only arises in bankruptcy. It has been found to be most convenient to adopt the rule in bankruptcy, that one partner shall not prove against another in competition with their joint creditors, except in cases of fraud; but, looking at the state of the facts at the time of the bankruptcy, and looking at the books, I think there was nothing more than contract, and that the proof must be expunged.

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Ordered.—Each party to have their costs out of their respective estates, but the assignees to have their costs out of the general estate, as they must at all events be covered.

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 July 18,
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Ex parte BOLTON.—In the matter of BAILLIE
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Statute of limitations not a bar in cases of fraud.

A COMMISSION issued in October 1806, against *Baillie and Jaffray*.

In November 1806, *J. Parker* proved for 1,514*l.* 7*s.* upon a Bill accepted by the bankrupts, drawn by *M^cKenzie and Co.* in Spain. The bill did not become due till the 21st October 1807, when it was dishonoured, and on the 22d, *Cox*, under protest, took it up for the honour of one of the drawers who resided in Spain; and a receipt for the amount, signed by the agent of *J. Parker*, was now produced in court by the assignees. On the 2d of June 1807 a dividend of 1*s.* 3*d.* in the pound was declared; and the assignees, not being aware that the bill had been paid, included the debt proved by *J. Parker* in the first and in every subsequent order of dividend. For the first dividend, amounting to 94*l.* 12*s.* 11*d.*, neither *Parker* in his lifetime, nor his personal representatives, ever applied. Before a second dividend was declared, viz. in the end of 1807, *Parker* died, leaving his son, since deceased, and *Greenwood*, executors. Until after the death of the son, *Greenwood* did not act as executor, but, soon after his death, he received a letter from the solicitor of the assignees directed to the son, apprizing *J. Parker* that he might receive a dividend on the proof, which was the first inti-

mation *Greenwood* had of *Parker* having proved. Since the first order of dividend, six several dividends were, between 1811 and 1828, declared, and were respectively received by *Greenwood*. The assignees did not, at the time of any of the payments, require the production of the bill; and it was not, till within six months of the petition being presented, that they discovered it had been paid to *Parker*, the bill having remained in the possession of *Cox*.

In 1816 a commission issued against *Greenwood*, under which he obtained his certificate on the 8th September 1817.

As executor of *Parker* he proved a debt of 200*l.* under his own commission, in respect of monies due to the estate of *Parker* to the date of his commission.

In December 1831 the assignees applied to *Greenwood* to refund the amount of the several dividends, which he refused; but tendered to them the last dividend, amounting to 3*l.* 3*s.* 1*d.*, paid to him after he had obtained his certificate.

This was a petition by the assignees of *Baillie* and *Jaffray*, praying that the proof made by *J. Parker* for 1,514*l.* 7*s.* might be expunged, and that *Greenwood* might refund to them the several dividends, and pay the costs of the petition.

Mr. *Swanston* and Mr. *Richards* for the petition :—

The dividends having been paid in ignorance that the debt was fully paid, *Greenwood* must refund the amount, and the proof be expunged.

Two objections will probably be made to this application; the statute of limitations, and the certificate of *Greenwood*.

The statute of limitations does not, however, apply to

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this, which is a case of fraud. The respondent admits that he received the dividends without finding any document amongst *Parker's* papers shewing he was entitled, and merely because inadvertently a letter had been addressed to *Parker* by the solicitor. Even if there had not been any fraud, the statute would not be a bar to any part of this demand; for six years had not run between the receipt of the first dividend by *Greenwood* and the time he became bankrupt, *ex parte Ross*, 2 Gl. & J. 46. 330. The payment of a dividend is in the administration of a trust, and therefore may be recalled at any time. (a)

The same observations apply as to the certificate being a bar; for the certificate does not release the bankrupt from pecuniary demands in cases of fraud, *Mackworth v. Marshall*, 3 Sim. 368.

That this is a case of fraud appears from the facts, and from the respondent not having applied any of the dividends to the use of the testator's estate. The assignees are, therefore, entitled to the order as prayed.

Mr. *Montagu* and Mr. *Quin* for the respondents:—

There are four objections to this application:—1st, the Court has not jurisdiction over an executor, *ex parte Crow, Mont. & M.* 281, the remedy being by bill or by action; 2dly, the demand is barred by the statute of limitations; and, 3dly, by the certificate; 4thly, the drawer of the bill is not before the Court.

This is not a case of fraud, for the utmost which appears is that the dividends may have been paid by the assignees in their own wrong, and received by *Green-*

(a) See *Galway v. Barrymore*, 1 Dick. 163. *Burke v. Jones*, 2 V. & B. 275. *Ex parte Roffey*, 9 Ves. 468.

wood in error, both parties being ignorant of their respective rights at the time the payments were made. Any error which has arisen was from the laches of the assignees in not requiring the production of the bill when they paid the dividends.

Supposing, however, that *Greenwood* was not entitled to the dividends, the amount received prior to his bankruptcy was a debt proveable, and, therefore, barred by his certificate, and by the statute of limitations.

Cur. ad. vult.

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The CHIEF JUDGE:—This is a petition by the assignees, praying to expunge a proof upon a bill accepted by the bankrupts; and that *Greenwood*, the executor of the creditor, who proved, may refund the dividends received by him. The bill was not due till twelve months after the commission issued, when it was dishonoured by the bankrupts; and, being protested, *Cox* paid it for the honour of the drawer. The payment of the bill to *Parker* does not clearly appear, but the assignees produce the bill which they state they received from the executors of *Cox*, with a receipt endorsed upon the protest; and it may, therefore, be inferred, that it was paid to the holder. Previous to *Parker's* death in 1807, a dividend of 1s. 3d. in the pound was made, but which has not been claimed. In January 1811 a second dividend of 1s. was declared, and the assignees, in ignorance of the fact that the bill was paid, sent a circular to *Parker*, who, being dead, his executor received the circular, and claimed the dividend, which was consequently paid to him.

July 18.

In July 1814 a third dividend of 1s. 4d. was declared; and, in 1815, a fourth. *Greenwood*, the executor, became bankrupt in 1816, previous to which he had received two other dividends. He, as executor of *Parker*,

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proved about 200*l.* under his own commission as due to *Parker's* estate, and he obtained his certificate in 1822; and, in 1828, further dividends were declared under *Baillie's* commission, which were paid to *Greenwood*. The assignees have since discovered the fact of the bill having been fully paid in 1807, and they now call on *Greenwood* to refund the dividends which they paid in ignorance.

As these payments were made by assignees to a creditor in respect of a proof, they must be considered as payments made in the administration of a trust, in which all the creditors of *Baillie* are interested. Upon the principles, therefore, by which courts of equity are governed in the administration of trusts, and in compelling legatees to refund for the benefit of creditors, notwithstanding the lapse of time, or the negligence of the executor, the Court is of opinion that the statute of limitations is not a bar; and that, in such cases, the statute does not apply.

The amount of the payments previous to *Greenwood's* bankruptcy and certificate, although made in ignorance, was a legal debt, which might have been proved under his commission, and may, upon *Parker's* proof being expunged, now be proved. The certificate is, therefore, a bar. The proof must be expunged.

Sir *Albert Pell*:—In cases of fraud the statute of limitations does not apply, *Bree v. Holbeck*, *Doug.* 656. *South Sea Company v. Wymondsdell*, 3 *P. W.* 143; and I am of opinion that this is a case of fraud. *Greenwood* received the dividends as executor, and was bound to apply them to his trust estate, instead of which, in fraud of the trust, he applied them to his own use, consequently the statute is not a bar.

I abstain from giving any opinion as to the effect of

the certificate; but I am not satisfied how a certificate can be a bar in cases of fraud.

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Sir *John Cross* concurred with the C. J.

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Sir *George Rose* was absent.

The order was, that the proof be expunged, and that *Greenwood* should refund the dividends received since his certificate, with costs.

Ex parte GREENWOOD.—In the matter of BAILLIE and JAFFRAY.

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FROM the decision in the preceding case of *ex parte Bolton*, *Greenwood* was desirous to appeal to the Lord Chancellor, and a special case was prepared and approved by both parties, and submitted to Sir *John Cross* for his signature; but the statements did not meet his Honor's approbation, and a considerable time elapsed before he finally determined, when it was returned with an alteration in the statement of one fact with which *Greenwood* was dissatisfied.

This was a petition for a re-hearing, and it prayed that the order might be reversed, or that the fact in the special case upon which Sir *John Cross* did not agree with the parties might be found by the Court.

Mr. *Swanston*, for the assignees of *Baillie* and Co., objected, 1st, that following the rule in Chancery, a petition could not be re-heard after the lapse of six months.

A petition of rehearing in bankruptcy is not limited to six months.

A petition for rehearing need not state the ground upon which the rehearing is sought.

Upon an application by assignees to expunge a proof upon a bill of exchange by the holder against the acceptor, because the bill had since been paid by a third party, the drawer must be served, notwithstanding the assignees have the bill in their possession.

1833. Mr. *Montagu* was not called upon to answer the objection.

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Per Curiam.—There is no such rule in bankruptcy (a), and a petition may be re-heard at any time, especially under such circumstances as in this case.

Sir *John Cross* did not concur, thinking, that after the lapse of time, and the special case having been prepared, the re-hearing was precluded.

Objection overruled.

Mr. *Swanston* then objected, that the petition of re-hearing did not specifically state the ground upon which the re-hearing was asked.

Per Curiam.—Petitions of appeal and of re-hearing need not state the grounds; if they do, the party is limited to the special grounds stated.

Objection overruled, Sir *John Cross* dissentient.

Nov. 7. Mr. *Montagu* and Mr. *Quin* for the petitioner.

Sir *George Rose*, upon the petition being opened, said, that the order was defective upon the face of it, it not appearing that the drawer of the bill had been served or appeared upon the original hearing, and that the proof

(a) See *ex parte Dewdney*, 15 Ves. 479. *Ex parte Roffey*, 19 Ves. 467. *Ex parte Baker*, Mont. & M. 279. *Ex parte Bolland*, Mont. & M. 327. *Ex parte Tindall*, Mont. 379.

could not be expunged in his absence, as he was, upon the payment of the bill, entitled to all the dividends, unless it were an acceptance for the drawer's accommodation, which does not appear upon the petition; and even if it had so appeared he would be a necessary party.

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THE CHIEF JUDGE:—There are two points; 1st, that no question on the merits can be raised in the absence of the drawer; and, 2dly, that the petition does not state such a case as warranted the order, as it did not appear that it was an accommodation bill. *Prima facie*, therefore, *Parker*, as indorsee, upon payment of the bill became trustee for the drawer, and the only way that can be answered is by shewing that it was an accommodation acceptance. I think, upon that question the drawer ought to be heard, which is the essential question now raised. It seems to have been overlooked by the Counsel and Court upon the original hearing, or, if mentioned at all, it certainly was not pressed by counsel.

Mr. *Swanston* and Mr. *Richards* in support of the order:—

This objection, even supposing it would have been valid upon the original hearing, is now too late, the objection of want of parties being a preliminary objection. The only grounds of opposition relied on were the statute of limitations and the certificate. This objection supposes an interest in the drawer; but the bill is in the possession of the assignees, which is conclusive, as no demand could be made upon the bill without the possession, and they must therefore be considered as the owners. If the bill were outstanding the objection might perhaps be good. But *Greenwood* by the tender of the three

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guineas admitted the right of the assignees, by which he is precluded. The assignees, as holders, have all the right upon the bill as such.

[THE CHIEF JUDGE:—But then, as mere holders, the assignees would not have any right to make this application, as the Court would have no jurisdiction. It does not appear for what purpose the bill was given up by *Cox*. If because he had no interest, that is quite different to its being given up because the drawer had no interest. It was taken up by *Cox*, as stated by the assignees, for the honour of the drawer, who became entitled to all the dividends; and *Greenwood*, as representative of the holder, who proved, would be trustee for the drawer, and the assignees, having paid the dividends to *Greenwood*, could not recover them back.

All questions
 open on re-
 hearing.

The whole question is open upon the re-hearing, and must be considered as if it were being heard for the first time; for although the present point was not pressed at the original hearing, yet if the Court now sees that the order is erroneous it will rectify it.]

It seems that the assignees ought to have taken an assignment.

[Sir George Rose:—They would not be in a better situation if they had an assignment; they might have a right of action, but there would be no jurisdiction in this Court. They would not have any greater right than a stranger taking an assignment of a debt.]

It is not an assignment, but a release of all right upon the bill. The assignees claim the benefit of that release, by having the dividends returned which were paid in ignorance. It is not necessary, upon a question between the holder and a person who has received payment of a bill, that every person whose name appears upon the bill should be served. It is improbable that any

claim would be made after the lapse of twenty-five years.

As to jurisdiction, as a creditor has a summary remedy against assignees to enforce payment, so assignees are entitled to the same summary process to recover back dividends which have been received by a party who ought not to have received them.

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THE CHIEF JUDGE:—

It is to be regretted that this objection was not more pressed upon the former hearing, for the argument was upon the merits, that the statute of limitations and certificate barred any demand, by which it appears that *Greenwood* did not consider he had received them as trustee for any person, nor did he when he tendered the three guineas.

The application was on the ground that *Greenwood* received the dividends in fraud of the bankrupt's estate. If it had been an accommodation bill, then he would have had no right to receive them; but that question could not be decided in the absence of the drawer. There is no allegation in the petition that it was an accommodation bill; and although it is not necessary that the same precision should be observed as in special pleading, yet the petition must state sufficient to lead to the fair inference. Here the only circumstance is the possession of the bill, but the delivery to the assignees might have been with a claim of the dividends, or it might have been the giving up the right which then existed on the bill, which would raise a very different question. The fair inference on the statement in this case is, that it was an ordinary mercantile transaction, and not accommodation. The giving up the bill may be a release as to future dividends, but how can it give a right to recall those which have been paid?

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As it is a re-hearing I will further consider the question.

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Sir *George Rose* :—

I was not present upon the former occasion ; and upon reading the order I looked at the petition to see if it sustained it. The facts are, shortly, that the bill was proved by the holder against the acceptor before it was due, and upon its becoming due was paid by the drawer. But did that give the assignees any right to have the proof expunged ?

Then it is said that the assignees have got possession of the bill, and that the mere circumstance of possession is to work a total extinguishment and release to the extent of entitling the assignees to have the proof expunged, and to recall the dividends paid before they had even the possession of the bill. But how can it have any such effect ? The certificate might be an answer to any claim by *Cox*, though it might not as against a claim by the assignees. Is it to be a relinquishment to destroy all that has been done, or is it to be only a release and assignment as to future dividends ? All the dividends which were paid to *Greenwood* appear to have been properly paid, and the only effect of any assignment is to give a right to any subsequent dividend. Any other view could not be sustained. Then, if the claim is by the effect of the bill being assigned, the certificate is a good defence, although it might not as between a creditor and the assignees, in consequence of the trust existing in the administration of the bankruptcy.

In no view can the order stand, for upon the face of the assignees' petition it appears that the bankrupts were the persons primarily liable as acceptors, and the order ought to be rescinded.

Sir *John Cross* said he was not prepared to give his judgment.

Cur. ad. Vult.

Sir *John Cross* :—

This petition stood over, from my unfortunately differing from my learned colleagues.

[His Honor here stated the facts of the case.]

This petition was heard in 1832, when three of the judges (Sir *George Rose* not being in Court), after a full hearing, decided that the certificate was a bar, but that the statute of limitations did not apply, as it was a case of fraud. Nothing is done for twelve months, and then an application is made for a special case, and, when that could not be settled, a petition for a re-hearing was presented by *Greenwood*, in order to obtain the decision of the Court on the question of fraud, so as to enable him to have the special case settled for the purpose of appealing. When the re-hearing came on, Sir *George Rose* stated that the original order made was invalid for want of parties, and that the assignees must, therefore, begin *de novo*. In this I am unable to concur. If the error were apparent on the face of the petition or order, the Court of Appeal could rectify it immediately. If the objection were not so apparent, and required to be urged by counsel in argument, it is too late: *Greenwood* has repudiated being trustee for any one. Now it is proposed to rescind the order, and dismiss the original petition, on the ground of a *jus tertii*; an objection not taken by *Greenwood* or his counsel, but by the Court. And, unless there be any imperative inflexible rule to prevent it, justice demands that this case should be again re-heard. The Court ought not to surprise parties with objections of its own. The parties desired a re-hearing as to the question of fraud, and to that they ought to be confined, and the assignees ought not now

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to be dismissed the Court upon a point of form. It is alleged that the drawer has an interest in the bill, and we are called on to presume this fact; but as the parties who could furnish evidence of the real facts have been dead so many years, I can only consider the case as it appears before us. Upon *Cox's* death his representatives handed the bill over to the assignees, from which it clearly appears they considered they had no interest in it, yet we are called upon to presume a *jus tertii* after this lapse of time.

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HIS HONOR THE CHIEF JUDGE:—

When this matter was under discussion in this Court in 1832, the only defence suggested by the affidavits of the respondent, or urged by his counsel at the bar, was the answer given to the application made by the assignees before the petition was presented; namely, that *Greenwood* had received the dividends in question in ignorance of the fact that *Parker* had received payment of the bill in his lifetime; and that, as the five first dividends had been received, without fraud, more than six years before the application to refund, the respondent was entitled to avail himself of the legal defence afforded by the statute of limitations; and that the last dividend, therefore, amounting to three guineas, was all that the assignees were entitled to, and that that sum had been tendered to them and refused; and that, if not protected to the full extent by the statute, he was at least entitled to retain the three first dividends received before the date of his own commission, under which he had obtained his certificate. In the course of the argument it was suggested to the counsel by me, whether the respondent might not be considered as holding the dividend in trust for *Cox*, who had taken up the bill for the honour of one of the drawers, which was assented to at the time, and followed up by the remark, that, in that view of the case, *Cox*

ought to have been served with the petition ; but, upon the representation by the counsel for the assignees that the bill had been delivered up to them by the representatives of *Cor*, who was dead, and that it was then in their possession, the objection was not pressed, and the argument proceeded on the merits, upon the consideration of which the order was eventually made which the present petitioner now seeks to rescind or modify. Upon the petition being opened on the re-hearing, the learned Judge, who had been absent upon the former occasion, having suggested that the order to expunge the proof, having been made in the absence of the drawer, and of those who represented his interest in the bill, and without any proof of service upon them, could not be supported, and the objection having been adopted by the counsel for the respondent, it was thought desirable to have that question argued and decided in the first instance, because, if that objection should prevail, it might become unnecessary again to discuss the effect of the certificate and the statute of limitations. When the suggestion was made upon the hearing of the original petition, I thought it was answered by the facts of the case, from which, coupled with the possession of the bill by the assignees, I thought it might be fairly inferred that the bill had been accepted for the accommodation of the drawer, and that they had no claim upon the estate of the acceptor in right of *Parker's* proof; and, as the objection was not pressed, both parties seeming desirous to have the petition decided on the merits, I considered the objection as to the service waived, and proceeded to form my judgment upon the questions raised by the parties whose interest alone could be concluded by our decision. But when the objection was renewed upon the re-hearing, and pressed upon our attention, it became necessary to examine it

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more attentively, and for that purpose I thought it right to postpone our final judgment upon the point until we could have an opportunity of deliberating and consulting upon the subject.

The way in which the difficulty presents itself to my mind is this: the assignees demand the restitution of the dividend paid to *Greenwood* upon *Parker's* proof; if they assert their claim made in their character of assignees of the bankrupt acceptor, it is necessary, as a preliminary step, that they should expunge the proof of *Parker's* debt from the proceedings, and this they accordingly ask the Court to do; but if any other person has an interest in maintaining the proof upon the proceedings, the Court ought not to expunge it without his consent. The first question to be asked, therefore, is, has any other person an interest in the proof? *Prima facie*, the acceptor of a bill of exchange must be taken to have effects of the drawer in his hand, and, therefore, if upon the dishonour at maturity the drawer take it up, he is entitled to recover the amount from the acceptor, if solvent, or, if bankrupt, to prove it against his estate; or if it has already been proved by the indorser, to stand in the place of the indorser, and to receive the dividend upon his proof; and a person taking up a bill for the honour of the drawer stands in the same situation. (a) In this case, therefore, *Cox*, when he took up the bill in question, in 1807, must, *prima facie*, be considered as taking *Parker's* place, and as entitled to all the rights attached to his proof in respect of the bill. But this *prima facie* case may be rebutted by proof that the bill was accepted by the bankrupts for the accommodation of

(a) *Ex parte Wackerbeth*, 5 Ves. 574. *Ex parte Lambert*, 13 Ves. 179.

the drawers, and that they had no effects of the drawers in their hands; in which case, though the acceptor would be liable to *Parker* as an indorsee for value, the drawers, by taking up the bill, would derive no claim under *Parker's* proof, and *Cox* of course could have no better title than theirs. The main question, therefore, upon the branch of the case now under consideration, is, whether there be sufficient evidence to shew that this was an acceptance for the accommodation of the drawers, and that the acceptors had no effects in their hands.

The fact principally relied on by the assignees, namely, the delivery to them of the bill by the representatives of *Cox*, is not, I think, sufficient to raise any inference in their favour, unless all the circumstances under which it came into their possession were before the Court. It may, certainly, have been delivered up by *Cox's* executors, because they knew that *Cox* had no claim in respect of it; but it may have been sent to them for the purpose of ascertaining whether he had any such claim or not, or for some other purpose; and we are left without any clue to guide us, by those who had it in their power to give the fullest explanation.

There are, however, other circumstances in this case tending strongly to the conclusion that the acceptors never received any value for this bill. At the time it was taken up by *Cox* there was upon it the endorsement by the commissioners, shewing that it had been proved under *Baillie* and *Jaffray's* commission. At that time a dividend to the amount of 94*l.* 12*s.* 11*d.* had been declared upon the proof.

The commission was worked in London. The bill was taken up in London, by a merchant who must have well understood the right of parties upon such instruments; and yet no claim was made by *Cox* for the dividend.

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The inference from these facts is certainly very strong, that *Cox* knew that the drawer had no claim upon the acceptor in respect of this bill; and, therefore, that he either never took the trouble to enquire whether any dividends had been declared, or, being aware of the fact, declined to receive them. But the case does not rest there; for, although the bill has remained in the hands of *Cox* or his personal representatives for more than twenty years, he seems neither to have claimed the amount from the drawer or the acceptor, for the vouchers in the year 1831 come out of the hands of his personal representatives. These are undoubtedly very striking facts; from which, if *Cox* were before the Court, and could give no satisfactory explanation of them, I should feel myself compelled to draw the conclusion, that the bill had been taken up by him because the drawers were primarily liable, and that he had, therefore, no interest in *Parker's* proof against the bankrupt. But then there are circumstances to be placed in the opposite scale: the assignees must have had the means of ascertaining whether the bill was for value or not; they must be taken to have known their right, if it was not for value, to recover against the drawers; they appear to have been ignorant that the drawers, or any person for their honour, had taken up the bill; their forbearance, therefore, to seek reimbursement from the drawers, raises as strong an inference of their consciousness that the acceptance was for value as the silence of *Cox* affords on the other side. And now they are before the Court they might have shewn the fact that it was not for value; they might have shewn the circumstances under which they obtained the bill from *Cox's* executors; and yet they leave us without any explanation. Are we, then, in the absence of those who represent the drawer's interest, to raise an inference against them in favour of parties who might have given

further information, but have failed so to do? I think we ought not; because I do not feel myself at liberty to draw the same inference from the conduct of persons not before the Court, whom the party requiring me to draw the inference ought to have brought before us, that I should have done if they had been called upon for an explanation and had failed to give it, and still less when the party on whom the burthen of proof rests fails to give all the explanation of which his case is susceptible. Neither do I think that the mere possession of the bill by the assignees, unexplained, entitles us to consider them as representing the interest of the drawers, and to expunge the proof as upon their consent. I am, therefore, of opinion, that we ought not, upon this evidence, to expunge the proof; and considering the direction to refund the dividend as merely consequential upon the direction to expunge the proof, the former order made upon the original petition must be rescinded, of course without costs.

The only remaining question is, what is to be done with the original petition? there are three ways of disposing of it: 1st, by dismissing it with costs; 2dly, by dismissing it without costs; 3dly, by allowing the assignees to amend, re-answer, and serve all parties, reserving the question of costs until the merits shall be ultimately decided. In looking at this part of the case I cannot exclude from my view the fact that the respondent has obtained possession (innocently I will assume) of a considerable sum of money to which he had no legal claim, and which he had not applied to the only purpose to which, if rightly received, it ought to have been appropriated, and that a great portion of this money he may successfully refuse to refund. Neither can I overlook the circumstance, that the point upon which the case is now disposed of was not set up by him as a ground of defence in the first instance, in which case

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the Court might have allowed the petition to stand over till the proper parties were before the Court; but the assignees may have been misled into the belief that the grounds relied on in the respondent's affidavit were the only question to be agitated in argument. I think, however, that it is too late now to amend; and, on full consideration of all the circumstances of the case, I am of opinion that the petition ought to be dismissed, but, upon the grounds alluded to, and in deference to the opinion of my colleagues, upon whose judgment, in coincidence with my own, the original order was made, and especially in deference to the opinion already expressed by the learned Judge on my right, I think it ought to be dismissed without costs.

The original order was rescinded, and the petition of the assignees dismissed.

C. R.
 June 5,
 1833.

Where the petitioning creditor becomes bankrupt before the fourteen days for opening the fiat have elapsed, the Court will not supersede on the petition of another creditor who is prepared to issue a new fiat.

Ex parte SMITH.—In the matter of STRANGMAN.

IN this case a fiat was issued against *A.* on the petition of *B.*, which was not opened. Soon after a fiat issued against *B.* himself. An official assignee had been appointed under *B.*'s fiat.

This was the application of a creditor of *A.* that the existing fiat against *A.* should be annulled, and a new fiat issue on his petition.

Mr. *Montagu* for the petition.

Mr. *Ayrton*, for the official assignee under *B.*'s fiat, submitted to any order the Court might make.

Per Curiam.:—The fourteen days allowed for opening *A.*'s fiat have not yet elapsed. The assignees of

B., when elected, may proceed with the fiat against *A.* It is, therefore, doubtful, to say the least, whether we have authority to make the order prayed. All we can order is — Let *Smith* be at liberty forthwith to take new docket papers into the office; and, if the present fiat against *A.* is not prosecuted, let *Smith* be at liberty to take out a new fiat.

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SMITH.
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of
STRANGMAN.

Ex parte MEDLEY.—In the matter of HAYDAY.

C. R.
Dec. 9,
1833.

THE petition stated, that, shortly after issuing the fiat, the petitioning creditor quitted the country, and that it was uncertain when he would return. That it was material, and necessary for the interests of the creditors, that a fiat should be immediately prosecuted against him; and the petitioners were prepared to issue a fiat. The petition prayed, that the petitioners might be substituted as petitioning creditors, the present fiat annulled, and a new fiat issue.

The petitioning creditor left the country; and it was apprehended the bankrupt would follow him. The fourteen days for opening the fiat had not elapsed. A creditor petitioned to supersede, undertaking to issue a new fiat. But the Court would not interfere.

Mr. *Montagu*, in support of the petition, stated that it was apprehended that the bankrupt might follow the petitioning creditor; and that it was usual to make the order prayed, without prejudice to the rights of the present petitioning creditor.

Per Curiam.—The time for proceeding with the fiat has not yet elapsed. In a few days it will, and then the petitioners may take out a new fiat as of course.

Application refused. (a)

(a) In *ex parte Segrè*, Court of Review, 11th December 1833, the petitioning creditor was too poor to go on with the fiat, and it was annulled, and a new fiat issued before the expiration of the fourteen days, he consenting. Mr. *Parker* for petitioner. Mr. *Spence* for petitioning creditor.

C. R.
Dec. 9,
1833.

All the creditors assented to a supersedeas but one, for 2*l.* 14*s.* 2*d.*, who was abroad. Ordered, on depositing that sum with the registrar, and a sum to meet the expence of taking it out of Court.

In the Matter of BRECKNELL.

A PETITION to supersede, with consent of all the creditors, was presented. They had all signed but one, who was a creditor for £2 14*s.* 4*d.*, and was at Malta. Her solicitor had signed, but without authority.

The *supersedeas* was allowed, on depositing with the registrar the £2 14*s.* 4*d.*, with interest at 5*l.* per cent., together with a sum to cover the creditor's expences on taking the money out of Court.

C. R.
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The application for security for costs is *strictissimi juris*. Examining a witness before the commissioner as to the matter of the petition, and an application to the Court that the registrar may attend at the hearing with such examination, is a waiver of the right.

Ex parte TULL.—In the matter of DAVIS.

THIS was a petition by a creditor residing in America. The prayer was for the payment of a dividend.

Mr. *Montagu*, on behalf of the assignees, applied for security for costs. He stated the order of 12th August 1809, requiring signature to the petition by the petitioner, except in cases of partnership, or absence from the kingdom; in the former of which cases the signature of one of the parties is to be deemed sufficient, and in the latter case the petition is to be signed by the person presenting the same on behalf of the person so abroad.

In the present case the petition had been signed by the agent on behalf of the petitioner. With respect, however, to the responsibility of the solicitor signing, doubt was entertained, as it had been decided, in *ex parte Tüley*, 2 *Rose*, 83, and *ex parte Cadley*, 1 *Mont.* 352, that no responsibility for costs attached upon the attesting solicitor, but that it was confined to the propriety of the petition. Mr. *Montagu* added, that this application was made within the rule of practice in

similar cases in the courts of common law and of equity, in both of which courts the rule is, that an application for security for costs from a petitioner abroad is a matter of course, if made before any proceeding by the defendant; and that, in the present case, there had not been any proceeding.

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Mr. *Stewart*, for the petitioner, admitted the rule to be as stated by Mr. *Montagu*, but said that, in the present case, there had been a proceeding, the assignees having examined, before the commissioner, a witness with respect to the petition, and had this day made an application to the Court to compel the registrar to attend at the hearing with the examination.

And of this opinion was the Court, who said that requiring a security for costs was *strictissimi juris*; and that the examination, and the application this day as to the registrar's attendance, were to be considered as a proceeding.

Dismissed with costs.

In the matter of SKINNER.

THIS was a petition by the pledgee of policies of insurance, praying a sale, and leave to bid.

C. R.
July 3,
1833.

On the sale of
property
pledged, the
assignees cannot
have a reserved
bidding.

Mr. *Swanston*, for the assignees, stated they were desirous of being allowed to fix a reserved bidding.

Mr. *Montagu* for the petitioner:—Applications by assignees for reserved biddings are often made, but constantly refused, as was the case in Sir *George Duckett's*

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bankruptcy, where the property to be sold was of very great value. Allowing a reserved bidding would enable the assignees to prevent a sale by fixing an unreasonable sum. Moreover, assignees have no right to interfere with a mortgagee or pledgee, except to redeem.

PER CURIAM :—We cannot permit assignees to have a mere reserved bidding. If they desire actually to bid for this property, they may have permission ; but then they must recollect that the property may be knocked down to them like any other bidder.

Reserved bidding refused.

C. R.
 Dec. 9, 10,
 1833.

The Court will not rescind a purchase by the mortgagee, because he bid without leave of the Court.

Ex parte ASHLEY. — In the matter of BELL.

THIS was a petition by the assignees to rescind a sale of mortgaged property sold under the fiat, for which the mortgagee had bid and become the purchaser, without previous leave of the Court.

The facts of the case are as follow : Part of the bankrupt's real property was mortgaged to *Dixon* for a term of one thousand years to secure 5,000*l.*, which the commissioners, upon the application of *Dixon*, ordered to be put up to sale in the usual manner. Whereupon the assignees agreed with *Dixon* that the fee simple of the premises should be sold instead of the term only. The assignees wished to have a reserved bidding, but *Dixon* refused to agree thereto. At the sale the premises were knocked down to the agent of *Dixon* for 4,400*l.* The assignees refused to confirm the sale, and gave notice to *Dixon* that they would pay

off the principal and interest, which he refused to accept, unless they would pay the auctioneer's charges, the costs of obtaining the order for sale, and the costs and expences of his solicitor in coming up to London, and attending the sale, &c.

The petition prayed, that the contract of purchase might be rescinded and given up; and that, upon payment to *Dixon* of the balance of principal and interest, he might be ordered to surrender or convey the mortgaged premises to the assignees; and that *Dixon* might be ordered to pay all costs.

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Mr. *Swanston* and Mr. *Bethell* for the petition :—

The sale must be set aside, the mortgagee having bid without previous leave of the Court, *ex parte Hammond, Buck*, 464. The practice of obtaining leave is founded on very good reason; for if the mortgaged estate sells for more than the mortgage money, the mortgagee, being, as to the surplus, a trustee for the mortgagor, is bound to obtain the highest possible price, in order that there may be a surplus; while, as a purchaser, he of course will endeavour to pay as little as possible. If he had a power of sale he could not buy of himself; and what difference in this respect is there between a power of sale by agreement of the parties and by order of the commissioners?

By the established course of practice of obtaining orders to bid on the one side, and by the absence of all authority for a contrary course on the other, it has become a rule that a mortgagee can never, without leave, become a purchaser in bankruptcy when he has obtained an order for sale. It is a rule in equity, that no person shall bid, without leave, at a sale of property in the produce of which he is interested. And this rule is so strict as to extend to cases to which the reason does not

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reach, so that the guardian cannot purchase the estate of the infant.

Ex parte
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Mr. Montagu and Mr. Anderdon for the mortgagee were stopped by the Court.

THE CHIEF JUDGE:—

There is nothing stated, either in the petition or affidavits, to induce the Court to think that there has been any such impropriety of conduct on the part of this mortgagee as to call upon us to rescind the sale.

The charges and objections are—

1st. He bid without the previous order of the Court, with some unfair intentions.

2d. That he thereby obtained an unfair advantage.

If the second charge had been made out, that is, if the mortgagee had been guilty of unfair conduct, and had thereby obtained an unfair advantage, I would have rescinded the sale.

As to the first charge, what is advanced in its support?

1st. That he did not obtain leave.

2d. That he did not assent to the assignees having a reserved bidding. (a)

3d. That he employed another to bid on his behalf.

Neither the second nor the third objections are enough to induce me to rescind the sale.

As to the first, that he did not previously obtain leave, it is certainly stated in all the books of practice, and confirmed by numerous cases, that the practice is to obtain a previous order; but in all those books the

(a) See *re Skinner*, ante page 81. If the assignees buy in the mortgaged premises upon a reserved bidding, it seems that the mortgagee may hold them to the purchase; but if, instead of insisting on his right, he apply for a re-sale, he waives his right, *ex parte Baldock*, 2 Dea. & Ch. 60.

statement is accompanied by an expression of doubt as to its necessity. And the reason of the doubt of the Vice-Chancellor in *ex parte Hammond, Buck*, 464, was, because out of bankruptcy it was not necessary; besides which, in that case the application was on behalf of the mortgagee.

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It is quite clear that out of bankruptcy it is no objection to title that a mortgagee has become a purchaser. And no principle can be stated as the foundation of the practice in bankruptcy, except that Sir *Edward Sugden*, in his work on Vendors and Purchasers, states, that it may be said he could not be both vendor and purchaser without leave of the Court. But that ground is not enough to induce me to set aside the sale, although it may be enough to induce us to refuse our assistance when he comes here for specific performance, by calling on the assignees to convey to him, or goes before the commissioner to prove for the balance.

The rule requiring the mortgagee to procure an order to bid, if it exist at all, is merely technical, otherwise the Court would not grant orders for that purpose so very readily as they do. In this case he bought the fee, and not his mortgage term; his title did not enable him to set up the fee for sale.

Sir *John Cross* :—

The petitioners complain of an irregularity only: they do not come to set aside the sale merely because the mortgagee purchased, but because it was so very usual to obtain leave to bid that not doing so amounted to a most irregular deviation from the usual practice. I do not impute any fraud to *Dixon*, but the effect of this irregularity is that he gains 700*l*. It has been stated that *Dixon* might abandon the order for sale, and stand upon his rights as mortgagee; but I do not conceive he

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could do so, without the assent of the assignees, after so much has been done under it.

This sale took place under unusual, and, in my opinion, irregular circumstances; the result is, a gain of 700*l.* to *Dixon*; my opinion, therefore, is, that the sale ought to be set aside; not on any abstract principles, but because justice requires it to be done in this particular case.

Sir *George Rose* :—

When mortgages are sold under an order of the commissioners, it is not the mortgagee, but the assignees who sell. (a) The fact that orders to bid are usually obtained only shows that some doubts existed which rendered it prudent. In the present case it would have saved a petition. No doubt the practice has been to obtain an order. But who ever doubted that a mortgagee might purchase without? If the parties had continued solvent, *Dixon* could clearly have taken a conveyance of the equity of redemption, or a release of all the right of the mortgagor. If there were any such principles or reasons preventing mortgagees purchasing as those which prevent trustees or solicitors, the Courts would

(a) It was formerly supposed that upon the sale of a legal mortgage, the solicitor of the mortgagee conducted the sale, see 1 *Mont. & Gregg*. 96; but this question being agitated some years ago, Mr. *Montagu* said, that he would inquire at the bankrupt office, and the petition stood over until after the inquiry. The result of which was, that the assignees conducted the sale, as the mortgagee acts under the general order, which is virtually a general order to prevent a petition in every particular case.

The assignees conduct the sale of an equitable mortgage, *ex parte Smith*, 2 *Dea. & Ch.* 60. When mortgaged property is sold, and the same solicitor is concerned for the assignees and the mortgagee, a separate solicitor should be appointed for the purposes of the sale. *Ex parte Rolfe and Milne*, 1 *D. & C.* 77.

have acted very unadvisedly in granting orders to bid with the facility they have, it being done almost quite of course. But even supposing that it could be now shown, for the first time, that the law was otherwise, it would be too much to call on this Court, on a petition in bankruptcy, to decide against the validity of such purchases, when our decision might have a most important effect upon title throughout the whole kingdom.

This petition appears to me altogether irregular as to the relief it prays. If the mortgagee carried his order for sale into effect improperly, this Court might interfere; but how?

This petition prays the Court to rescind the sale; but it does not follow that would be done, even if we were of opinion the mortgagee had acted improperly in purchasing. In those cases where the Court interferes the sale is never set aside in the first instance, but a re-sale is ordered, and the first purchaser is held to his bargain, unless a better price is obtained on the second sale. (a) But it is doubtful whether we could order a re-sale in this case. All the assignees could do would be to rescind the order, which is now *functus officio*, and cannot be enforced a second time against the mortgagee.

Concerning the second branch of the prayer, this Court has no more jurisdiction to order the redemption of a mortgage than it has to entertain a criminal question. If the mortgagee came here to compel the assignees to convey to him, then indeed would properly arise the question, whether they might set up his purchasing without an order as a defence. But this application is similar to one that the contract should be delivered up to the assignees, which is far too much for them to demand.

If there exist in the profession an opinion that a

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(a) *Ex parte Reynolds*, 5 Ves. 707. *Ex parte Lacey*, 6 Ves. 625.

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mortgagee may safely purchase, it ought to be understood that nothing which now falls from the Court is intended to shake that opinion. But, on the other hand, there certainly is a practice that mortgagees should procure an order to bid; and I would not, incidentally, on a petition of this sort, make any order, or deliver any judgment, to interfere one way or the other with such practice, which no doubt is a prudent one. The circumstances of this case are not such as to authorize the Court to set aside the sale; and we only declare such to be our opinion when we declare that this petition must be dismissed.

Costs reserved. Parties to endeavour to settle them out of Court. (a)

(a) In a note to 1 *Madd.* 148. is the following: — "The reporter has a short note of a case in Hilary term 1806, in which it was decided, that under an order in bankruptcy for the sale of a mortgaged estate, the mortgagee may become the purchaser, and come in, under the commission, for so much of the mortgage money as was not raised by the sale."

The next case is *ex parte Marsh*, 1 *Madd.* 148. A.D. 1815. There Mr. Cooke stated that there was no express decision that a mortgagee cannot purchase the mortgaged estate*; but some doubts having been expressed, it was thought prudent to apply for the present order. In causes such an order has frequently been

made, as was the case in the estate called Cannons, purchased by your Honour; and there seems to be no reason why such an application should not be made in bankruptcy. Mr. Agar, for the assignees, did not object. And the Vice Chancellor said, There can be no objection to this person being a bidder. It is for the interest of the estate that there should be as many bidders as possible. Petition granted. Costs out of the estate.

The next case is *ex parte Du Cane, Buck*, 18. A.D. 1816. It was contended, on behalf of the petition, by Mr. Hart, that orders of the nature prayed were made every day, as they were manifestly for the benefit of the bankrupt's estate, and prevented the property from being sold at an undervalue. Mr. Roots opposed

* *Qu.* "Without an order" omitted?

Ex parte DAVIS.—In the matter of HAGLEY.

A MORTGAGEE with a power of sale had himself put up the premises for sale under the power, and now applied to the Court for leave to bid.

Mr. *Richards* for the petitioner.

Mr. *Stewart* for the assignees.

C. R.
Dec. 10,
1833.

A mortgagee with a power of sale himself put up the premises for sale, and then applied for leave to bid : Held, he could not be permitted, unless he waived the power, and had the property sold under the order of the commissioners.

the petition, on the ground that the Court would not suffer a party who was, in fact, the vendor of the property, to become the purchaser, because, as such, he would have an interest in depreciating its value. The Vice Chancellor said, In all these cases, where it is necessary to apply to the Court for leave to become a purchaser, there must be a possibility of some conflicting interest, otherwise the application would be unnecessary. And the order was made.

In this case the Vice Chancellor appears to have been of opinion, that the order was only necessary when there was a possibility of some conflicting interest.

The next case is *ex parte Hammond, Buck*, 464, A.D. 1820, where the Vice Chancellor said, he doubted the necessity of presenting petitions in cases of this nature ; for, as it was always competent to a mortgagee to purchase from the mortgagor the equity of redemption, it did not appear to him that the bankruptcy made any difference in this respect.

Mr. *Preston*, as *amicus curiæ*, stated the general understanding of the profession to be, that it was necessary for the mortgagee to apply to the Court for liberty to bid at the sale. And the cases of *ex parte Du Cane* and *ex parte Marsh* having been mentioned, the order was made as prayed, the petitioner paying the costs of the application, and the assignees consenting.

Ex parte Hodson, 1 Gl. & J. 12. A.D. 1821. The Vice Chancellor said, The mortgagee might bid if the sale were before the commissioners, and conducted by the assignees.

In *ex parte Robinson, Mont. & Mac*. 261. A.D. 1829, the Vice Chancellor said, I am informed that the ordinary practice at the bankrupt office is to draw up the order, directing the costs to be paid by the mortgagee, who applies to the Court for permission to bid ; and I think this, which is the usual rule, the most proper one.

Where the assignees consent, the costs of the petition for leave to bid may be paid out of

1833. *Per Curiam* :—

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A mortgagee with a power of sale cannot be permitted to bid, unless he waives his power of sale, comes in under the fiat, and has the premises put up for sale under the order of the commissioners, when the assignees will have the conduct of the sale.

Dismissed with costs. (u)

the proceeds of sale. *Ex parte Say & Mont.* 364. S. C. 1 *Dea. & Ch.* 32. A.D. 1831.

The general rule is, that where a mortgagee applies for leave to bid he must pay the costs of the petition, unless the assignees should consent otherwise. *Ex parte Williams*, 1 *Dea. & Ch.* 489. A.D. 1832.

In *Webb v. Rorke*, 2 *Sch. & Lef.* 661, on a question whether a lease from a mortgagor to a mortgagee could stand, Lord *Redesdale* says (p. 673), Another objection was, that this decision may tend to impeach dealings between mortgagor and mortgagee for a sale of the equity of redemption. But to this a good answer was given at the bar. The cases are totally different; the parties stand in a different relation. If there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them; and if the mortgagee should refuse to convey to another person, the mortgagor can compel him, by applying the purchase money to pay off the mortgage. It can,

therefore, only be for want of a better purchaser that the mortgagor can be compelled to sell to the mortgagee. But courts view transactions even of that sort between mortgagor and mortgagee with considerable jealousy, and will set aside sales of the equity of redemption where by the influence of his incumbrance the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase.

In *ex parte Hodson*, 1 *Gl. J.* 12. A.D. 1821, the mortgagee had a power of sale, but was allowed nevertheless to waive the power, and come in under the commission, and have his mortgage sold as usual; in which case he was allowed to bid.

In *ex parte Davis*, *ante* p. 89, the Court refused a mortgagee, selling under a power of sale, leave to bid, unless he waived the power, and came in under the commission.

(a) *Ex parte Hodson*, 1 *Gl. & J.* 12. *supra* in this page.

Ex parte CLEGG.—In the matter of DOUGLASS.

C. R.
December,
1833.

THE petition in this case stated that there were cross acceptances between the petitioners and the bankrupt, that the bankrupt's were dishonoured, and a fiat having issued against him, the petitioners refused to pay the bill which they had given the bankrupt, insisting on their right to set off, whereupon the assignees commenced an action against them on the bill. The prayer was, that the petitioners might be declared entitled to their set off, and the assignees restrained from proceeding in the action.

Where there are cross acceptances, and the right of set off clear, the Court will restrain the assignees from bringing an action.

Mr. *Swanston* and Mr. *K. Parker* for the petition were stopped by the Court.

Mr. *Twiss* and Mr. *Rogers* for the respondents :—

The remedy in this case, if any, is by set off at law. Injunctions are only granted where there is an equitable defence, though not a legal one. (a) The only case in which such an injunction was ever granted is *ex parte Minnett*, 1 *Rose*, 395, the ground there being that the commissioners had actually found that a balance was due from the person bringing the action.

THE CHIEF JUDGE :—There is no doubt that any party has a right to come into this Court for relief

(a) Equity grants relief in all cases where there is an equitable but not a legal set off, *James v. Kynnier*, 5 *Ves.* 108. But it has been said, that there is not any difference in bankruptcy between a set off in law and in equity, *ex parte Flint*, 1 *Swanst.* 33. If a party neglect to plead a set off at law, he cannot afterwards come to equity for relief. *Ex parte Ross, Buck*, 127.

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against the assignees, in respect of all acts done by them as such. This is the ground of the interposition of the Court in the case of short bills. The question of costs should stand over, because it is possible to conceive that the conduct of the assignees in bringing this action has been so improper as to require that they should pay costs personally, though I do not pretend to anticipate such a result. The action must be stayed in the meanwhile.

Sir John Cross : — This is a petition to restrain the assignees from an improvident expenditure of the estate in pursuing an action, in a case where set off must succeed at law. I think the injunction ought to go.

Sir George Rose : — I apprehend there can be no question but that these bills may be set off at law, and that the action must be stayed. The only question is, who is to pay the costs of this petition. In order to decide that, we must ascertain what were the motives of the assignees in bringing an action, when they might have called the petitioners before the commissioners, who would have taken the account, and have stated the balance, on whichever side it might be. We must, therefore, send this case to the commissioners, to pursue an inquiry relative to these questions. But nothing that can be supposed to arise in the course of such inquiry can prevent the injunction going in the mean time.

Injunction to stay action granted. An inquiry to be prosecuted before the commissioners. Costs to stand over.

Ex parte LUCAS.—In the matter of OLDHAM.

C. R.
Dec. 11,
1833.

IN 1829 *Oldham* agreed to lease certain premises to *Edge*, who thereupon entered into possession. In March 1831 a commission issued against *Oldham*, and in July 1831 a commission issued against *Edge*. The assignees of *Edge* entered upon the premises, and elected to take the agreement, whereon a draft lease was tendered them by the assignees of *Oldham*, containing a covenant not to assign, which they refused to execute.

If the intended lessor and lessee both become bankrupt, and the assignees agree to take a lease, it seems the Court have not jurisdiction to enforce specific performance

This was a petition by the assignees of *Oldham*, praying that the assignees of *Edge* might be ordered to execute the lease.

In this case the Court refused to interfere.

Mr. *Swanston* having read the petition, Sir *George Rose* said, The questions were,

- 1st. Whether the assignees agreed to accept the lease?
- 2d. Whether there be jurisdiction over the assignees?
- 3d. Whether, if there be, this Court will enforce specific performance?

Mr. *Swanston* and Mr. *Geldart* : —

Assuming the fact that the assignees agreed to accept the lease, the question is as to the power of this Court to enforce specific performance; a power which it is in the discretion of courts of equity to exercise or not. But this discretion is not arbitrary, being guided by the circumstance whether or not damages would be an adequate compensation; and the only qualification of the rule is, that parties coming to equity for specific performance must themselves do equity; so that if there

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be any circumstances of fraud the Court may refuse to interfere; but its discretion is bounded by such circumstances, and where they are wanting the Court is bound by every rule to interfere. As there is no want of equity in this case, the only question is, whether the Court has power to interfere, which it has, both the parties being bankrupt. (a)

Formerly, when bankruptcy petitions were heard before the Lord Chancellor, the Court, on all occasions where it was practicable, shifted cases over from its jurisdiction in bankruptcy, to its more enlarged jurisdiction as a court of equity.

The distinction between equity and bankruptcy consisted in this, that in bankruptcy,

1st. The evidence was on affidavits;

2d. There was no appeal;

3d. There was less deliberation than in equity.

None of these reasons now apply.

[*Sir George Rose*:—In the proposed lease the assignees would be personally liable, and not merely as assignees; what jurisdiction then have we over them? *Erskine*, C. J.: If assignees take a lease under ordinary circumstances, they are only liable while they keep it: they may assign, and get rid of that liability. (b) If they were compelled in this case to sign the lease, and become personally liable, assignees would never adopt agreements for leases, however beneficial.]

In fact they have adopted this lease, and the liabilities

(a) See *ex parte Edwards*, charge themselves. *Onslow v. 1 Atk.* 100. *Corrie, 2 Madd.* 330. See some

(b) If assignees accept a lease, observations by *Sir S. Romilly* for the purpose, as it seems, of as to the act called his act. The discharging the bankrupt, they part which is in italics is an inference from the case, which, as it may, it has been determined, may not be correct, is in italics. assign it to a beggar, and dis-

consequent thereto are the result of such adoption, which was in their own election.

In *ex parte Fector, Buck*, 429, Lord Eldon ordered the assignees to repay a deposit to a purchaser, even after the commission had been superseded. In *ex parte Gould*, 1 Gl. & J. 231, the Court compelled a purchaser of part of the bankrupt's property to complete his purchase. In that case the Court exercised jurisdiction for specific performance as fully as any court of equity could do. There the party was a purchaser; here the parties are assignees, which makes a much stronger case for the interference of the Court. In *ex parte Tomkins, Sugd. V. & P.*, App. xi., Lord Eldon decreed specific performance against the assignees, they having appointed puffers to bid for a mortgaged estate sold under the order of the commissioners, and two lots being knocked down to them.

[The CHIEF JUDGE:—That case goes no further than this, that assignees are bound to indemnify the estate from the consequences of their acts.]

As to their personal liability on actions by landlords for rent on leases which they have elected to take, the smallness or total want of assets would be no answer; they must personally pay the rent, if there be no assets.

In the very important case of *ex parte Cowan*, 3 B. & Ald. 123, the Judges defined their opinion of what was the jurisdiction of the Lord Chancellor in bankruptcy. Lord Tenterden says, "A petition in bankruptcy is *festinum remedium*, and it contributes not less to the saving of expence than the saving of time. The proceeding under the commission operates by way of sudden seizure of property belonging or supposed to belong to a bankrupt. A process so speedy and summary requires to be controlled by a speedy and summary course of relief." And again, "We think

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the assignees are unquestionably subject to the controul and jurisdiction of the Lord Chancellor sitting in bankruptcy for all acts done by them in their character of assignees by virtue or under colour of the commission."

We now come to the act under which this Court sits. The recital is important, as defining the nature of the evil, and of the remedy intended. The preamble recites, that "it is expedient to provide means for administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise touching the same, other than are provided by the said act, to the end that the rights as well of the bankrupts themselves as of their creditors may be enforced with as little expence, delay, and uncertainty as possible." And the second section enacts that the Court of Review "shall have superintendence and controul in all matter of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as now usually are or lawfully may be brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided; and also to investigate, examine, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as are by this act, or may be by the said rules and regulations, assigned and referred to the said Court of Review."

It appears, therefore, that the Court is to administer justice in all questions which arise between bankrupt estates, being authorized to do all that the Lord Chancellor might have done on petition, motion, "or otherwise;" that is by bill, provided it be a matter in bankruptcy; and the present case is clearly a matter in bankruptcy. The words of section 2. give the Court

power to entertain all matters of bankruptcy, and all other matters which might come before the Lord Chancellor by petition, motion, or otherwise. If the Court decide they have no jurisdiction on this petition, they will in effect resolve that this act, which was intended to extend the jurisdiction, has confined it.

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Sir George Rose : —

With every inclination to extend the useful jurisdiction of this Court, I cannot say that we have any further jurisdiction than the Lord Chancellor sitting in bankruptcy had formerly.

As to the agreement in question, I do not say that bankruptcy has destroyed its validity. It may be that it can be enforced in equity; it may be that damages are recoverable at law for its non-performance; it may be that the benefit to be derived under it can be sold under the bankruptcy, as equitable mortgages, &c. are: in short, the assignees may have incurred liability, which may be dealt with in the proper place; but is this Court that place?

In many cases it has been decided that this Court has no power to bind the executors (a) of assignees to contracts. One very strong case occurred before Lord *Eldon*, where something was required to be done against the executor of an assignee, but Lord *Eldon* repudiated all jurisdiction over him.

In the case now before the Court, if we order the assignees of *Edge* to execute the lease tendered by the assignees of *Oldham*, we deprive the assignees of *Edge* of the right of disputing the bankruptcy of *Oldham*, and, while deciding a case of contract, estop them from disputing a bankruptcy.

(a) See *Saxton v. Davis*, 18 Ves. 80, 1 Rose, 79; *ex parte Lane*, 1 Alk. 90; *ex parte Crowe*, 1 Mont. & M. 231.

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This contract was with the bankrupt, and can we call on his assignees personally to carry it into execution?

I should feel considerable regret if it should be for a moment supposed that this Court had any jurisdiction in a case like the present.

Mr. *Spence* and Mr. *Richards*, for the assignees of *Edge*, declared that they could not put the case better than Sir *George Rose* had stated it, and that they adopted his observations as their speech.

THE CHIEF JUDGE:—Mr. *Swanston* will then consider himself at liberty to treat the suggestions of Sir *G. Rose* as the arguments of Mr. *Spence* and Mr. *Richards*, and may reply accordingly.

Mr. *Swanston* in reply:—

The Court appear to be about to repudiate a jurisdiction which it has under the express terms of the act, on the ground that such jurisdiction was not formerly exercised. But that point has not been established. The cases only establish a rule, that the Court will not assume jurisdiction over the personal representative of an assignee.

It will be time enough to oppose that rule to the petitioners when one of the assignees of *Oldham* is dead. Where the Court has not made any order during the life of an assignee it might be difficult to make one for the first time on his representative after his death, but if made during his life there would be no difficulty in enforcing it after his death.

As to the argument, that the assignees of *Edge* must not be now estopped from disputing the commission against *Oldham*, it cannot surely be contended that their appearing here as respondents, and having an adverse

order made against them, will have that effect, so as to prevent them from disputing the commission at any other time or place.

I rely upon the cases of *ex parte Cowan* and *ex parte Tomkinson*, in addition to which may be cited *ex parte Gore*, 1 *Deacon*, *B. L.* 328. In that case a bankrupt had contracted to purchase a quantity of wool, on an agreement that a deposit of five per cent. was to be made on the amount of the purchase money, and that the remainder was to be paid when he took away the wool; and after the deposit was made, and the bankrupt had taken away part of the wool, the price fell in the market; and the assignees contended, that the seller could have no further claim after the forfeiture of the deposit. The Vice-Chancellor held, that, the bankrupt having taken away part of the goods, the assignees were bound in the terms of the contract to take away the remainder, and he ordered the residue of the wool to be sold, and that the vendor might prove for the difference between the amount of the proceeds and the price which the bankrupt had agreed to give for it.

It cannot be disputed that the Court might compel the assignees to elect whether they would accept or reject the agreement; in this case they have accepted. Cannot the Court order them to do such acts as will complete the acceptance, and render it available?

The terms of the statute make the conclusion I contend for inevitable.

It is a maxim as old as legislation, that “*Boni judices solent ampliare jurisdictionem.*”

The Lord Chancellor administered justice in bankruptcy on petitions and bills alone; for, properly speaking, there were no motions allowed in bankruptcy. If the matter were too important for decision on a petition a bill was ordered to be filed.

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Undoubtedly the intent of the legislature was to transfer to this Court all the means which the Lord Chancellor had of administering justice in bankruptcy, whether on petition or bill.

[Sir George Rose; — Motions (a) were allowed on many occasions, as before the commission was opened,

(a) Under the old system motions in bankruptcy were not common, the reason of which was, that, owing to the peculiar nature of the jurisdiction, disobedience to an order made on motion was no contempt. *Re Morgan*, 1 Rose, 192; *ex parte Gilton*, Buck. 549; *re Hardy*, 252; *ex parte Johnstone*, Mont. & Mac. 82. Lord Eldon was of opinion that it was desirable to relax that rule. *Ex parte Harman*, 2 Gl. & J. 26. The only exceptions, however, which in fact prove the rule, were applications, where the commission had not been opened, to make some alteration therein, to give effect or validity to the commission, or that a country fiat may issue instead of a London one, or *vice versa*; or in favour of liberty, for a prisoner to be discharged from an arrest; or applications from necessity, that service of the petition at the last place of abode might be good service; or for permission to amend a petition; or an order, before it was drawn up. *Dictum*, *arguendo*, *ex parte Johnstone*, Mont. & Mac. 83.

But, under the third section of the Bankrupt Court Act, all matters to be heard in the Court of Review shall be brought on by way of petition, *motion*, or special case, &c.; and as it is a court of record, disobedience to an order made on motion would be a contempt; but, it being ordered "that the practice of the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Lord Chancellor," (Orders, January 12, 1852,) motions are only at present allowed in the Court of Review in such cases as they were formerly before the Lord Chancellor.

The advantages of motions are: they are less expensive; they only require two days' notice; they may be brought on independently of the petition paper; and affidavits used may be filed any short time before. *Ex parte Gilton*, Buck. 549.

The Court, on motion, will order the discharge of a person illegally arrested. This has been done in many cases; as where the bankrupt was arrested on his return from attending the com-

which is enough to satisfy the word "otherwise." When a bill was filed, though it contained a question in bank-

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missioners, 1 *Rose*, 230 *; on his going to surrender, *ex parte King*, 7 *Ves.* 312, (and see the cases there referred to); *Ogle's case*, 11 *Ves.* 557; on his being arrested during the time of protection, *ex parte Price*, 5 *Ves.* & *B.* 23. See *ex parte Bryant*, 1 *Madd.* 49; *ex parte James*, 1 *P. Wms.* 611. The Court will also discharge a solicitor going to (*Castle's case*, 16 *Ves.* 412.) or returning from hearing a petition (*Gascoyne's case*, 14 *Ves.* 183.) or a witness arrested when attending the commissioners (*Byne's case*, 1 *Ves.* & *B.* 317.) In *Castle's case* and *Gascoyne's case* the solicitor was examined *visd voce* on oath.

It should, however, be observed, that petitions have been in many cases presented for the discharge of persons improperly arrested, which, according to Lord Eldon, must be done where the arrest does not amount to a contempt of Court, 1 *Rose*, 230. Petitions were presented in the following cases: *ex parte Kerney*, 1 *Atk.* 53; *ex parte Gibbons*, 1 *Atk.* 238; *ex parte Parker*, 3 *Ves.* 554; *ex parte Hawkins*, 4 *Ves.* 691; *ex parte Wood*, 18

Ves. 1; *ex parte Ross*, 1 *Rose*, 260; *ex parte Russell*, 1 *Rose*, 278; *ex parte Temple*, 2 *Rose*, 22; *List's case*, 2 *Rose*, 24; and *ex parte Helsby*, *Mont. & Bli.* 79, *S.C.* 1 *Dea. & Ch.* 16.

The Court will, on motion, discharge a party in contempt for non-payment of costs who has become entitled to his discharge by virtue of his certificate. *Wall v. Atkinson*, 2 *Rose*, 196. It will also amend an order while in minutes, or make an order for substituted service. *Ex parte Peyton*, *Buck*, 200; *ex parte Anderson*, *Buck*, 38; *ex parte Dunlop*, 3 *Madd.* 279; *ex parte Palon*, 3 *Madd.* 116. In *ex parte Peyton* the office refused the order on motion, but it was allowed by the Court on the authority of *ex parte Anderson*.

A motion may be made for a new trial, 1 & 2 *W.* 4. c. 56. s. 33.

An application for a *habeas corpus* is by motion. *Ex parte Lingood*, 1 *Atk.* 240; *Taylor's case*, 8 *Ves.* 330; *ex parte James*, 1 *P. Wm.* 610; *ex parte Vogel*, 2 *Barn. & Ald.* 225. A motion may be made that proper officers of the Court may attend at the assizes with a petition and affidavits, on a trial for perjury. *Re Thomas*, *C. of R.*; 5th July 1832.

The Court cannot, on motion,

* In this particular case the application was refused on motion, and a petition presented.

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ruptcy, yet it was a proceeding in equity, and it was filed in the office of the six clerks.]

I contend "bills" were included in bankruptcy.

[Sir John Cross:—In Lord King's time, numerous matters in bankruptcy were the subject of a bill which afterwards became the subject of a petition in bankruptcy.]

It is enough for the purposes of argument, that a question in bankruptcy was decided upon bill. The office into which the proceeding is carried, whether bill or petition, is no test whether the matter was in equity or in bankruptcy. Orders in bankruptcy were continually made when only the registrar in Chancery was present, and not the secretary of bankrupts.

Finally, I would ask, what evil can follow from the exercise of this jurisdiction?

order a witness to attend the commissioners. *Ex parte Morgan*, 1 Rose, 192. And it was laid down in *ex parte Gitton, Buck*, 549, that an application for a petition to stand over must, unless by consent, be made by petition, though it was said that it was not usual to object to its being done on motion. And see *re Hardy & Dales*, 6 Mad. 252, and *ex parte Parker, Buck*, 549. But since the establishment of the Court of Review the invariable practice has been to make the order on motion.

In *ex parte Coponhurst, Buck*, 746, a petition to supersede having been deferred till the event of an action brought by the bankrupt was determined, and the

verdict being against him, the original petition was, on motion, dismissed.

It was the opinion of Chief Justice Abbott, that the Court could remove assignees without a petition. *Altritt v. Küttridge*, 6 Moor. 570, S.C. 1 Bing. 355. Such, however, has not been the practice.

Where an affidavit referred to exhibits, a motion for their production was not objected to. *Ex parte Armsby*, 2 Dea. & Ch. 192.

Motions are frequently made as to the answering petitions without signature, attestation, &c., or to allow agents, &c. to sign or attest, &c.

The CHIEF JUDGE:—

Any question concerning jurisdiction is of considerable importance, both to the public and to the Court. On one hand, the Court should not assume a jurisdiction it cannot maintain; on the other, it should not dismiss suitors to a more expensive and tedious tribunal.

It is contended, that, by the language of the act, the Court has more jurisdiction than the Lord Chancellor had formerly. I cannot adopt the result of that argument. It is said, that the first part of the clause gives us a further jurisdiction under the words “superintendence and controul in all matters of bankruptcy.” Can any one deny that the Lord Chancellor had “superintendence” and “controul” in all matters? These words, therefore, confer on us no jurisdiction which the Lord Chancellor had not. It is also contended, that the words “or otherwise” give some further power. If so important a matter as an addition of jurisdiction had been intended, the words would have been express (a); a new jurisdiction can hardly have been meant to be given by “or otherwise.” Could not the Lord Chancellor hear and determine “all matters in bankruptcy” before the new act? We have his jurisdiction, and no more. If he had always acted on petition, Mr. *Swanston's* argument might have been conclusive; but as he sometimes, though not often, made orders on motions, that satisfies the words “or otherwise.”

The Lord Chancellor frequently ordered a bill to be filed, but that was not because he could not have decided on petition, but because he desired a more solemn and deliberate mode of proceeding, and one which admitted of appeal.

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(a) See the observations of Lord Lyndhurst in *ex parte Burgess*, 2 G. & J. 199.

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If, however, the state of facts detailed in this petition, if the mere adoption of the agreement by the assignees, would justify *any Court* in interfering to order the assignees to execute this lease, I should think this Court had power to do so, being a matter under the bankruptcy. But I think no Court would order assignees of a bankrupt to execute a lease which rendered them *personally* liable, merely on the ground that they had taken to an agreement. What is here sought to charge them with is far beyond what they incur by accepting a lease, where they may get rid of all personal responsibility by assigning it. Here they would remain *personally* liable.

But it is urged, that the assignees have done more than adopt the agreement; that they had actually agreed to take the lease. Assuming such to be the case, the question arises, in what Court should specific performance be enforced? Not in this Court. It does not help the petitioners, that the respondents are assignees, and personally liable. Such may be the case, but this is not the Court in which to enforce that liability. It makes no difference that both parties are bankrupt, unless it can be shown that every person making a contract with another who happens to be the assignee of a bankrupt may come to this Court for specific performance. I do not say that it would not be expedient we should exercise the jurisdiction asked; it might be convenient and less expensive; but the legislature has not invested us with greater power than the Lord Chancellor had when sitting in bankruptcy.

I am of opinion that this Court has no jurisdiction to enforce specific performance in cases like the present; and that if we had, this would not be a proper case for our interference. But I will suspend my final judgment till I hear that of my learned colleagues.

Sir John Cross : —

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I cannot but regret that any member of the Court shall so declare an opinion during the course of the cause as to enable counsel on either side to calculate upon the ultimate decision, and to shape their arguments accordingly.

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In this case, by means of a certain contract, two persons obtain interests in one estate, both become bankrupt, and the assignees of the one agree to abide by the contract. Two years elapse, and though they retain the estate, they refuse to fulfil the terms of the contract under which they have possession. The other party come here to enforce this contract. It is objected, that the remedy is in equity alone. I cannot reconcile it with my duty, as a Judge of a Court not oppressed with business, to turn suitors away, and send them to a Court overburthened with causes, in a matter of bankruptcy over which I conceive I have superintendence.

The preamble of the act under which we sit gives us power in all causes touching the effects of bankrupts. Is not this a question touching the effects of bankrupts? We sit here to administer one branch of the law exclusively; and if, in a case of doubt, we send the parties to equity, it is in direct contravention of the purposes for which the Court was instituted, and, in effect, amounts to a delaying of justice.

Of the second clause of the act I do happen to know that there never was a clause on which more care was bestowed.

It has been asked, Where is there any authority that the Lord Chancellor sitting in bankruptcy ever exercised jurisdiction in a case similar to the present? Suppose there is none? If, indeed, one could be found in which

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he had declined to act for want of jurisdiction, it would have been quite a different thing.

I cannot agree that our jurisdiction is bounded by the fact, whether or not the books of practice contain a case on all fours with the present. A book of practice cannot be engrafted on an act of parliament. The statute cannot set forth every occasion on which our jurisdiction is to be exercised. I only now throw out my present opinion, reserving my right further to deliberate.

Sir George Rose : —

This case has been argued as on a demurrer, taking the facts for granted; and then two questions arise :

1st, Have we jurisdiction?

2d, If so, are the petitioners entitled to what they ask on the merits?

1st. As to jurisdiction. This Court has it on all matters in bankruptcy. What then is the meaning of the phrase "jurisdiction in bankruptcy?" I understand it to mean precisely that which the Lord Chancellor exercised before this Court was constituted, after which that jurisdiction was transferred here, and no more.

As to judges interposing their opinion, is it not fair to relieve counsel from arguing when we can? (a)

There are many other reasons, besides the words of the act of parliament, which lead me to the opinion, that this Court are not to assume jurisdiction in all those various cases which may be tried in the different courts of Westminster Hall.

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This petition stood over for the parties to try and arrange between themselves, which was not done.

(a) Kind as the intention may be, has it the effect intended? See Lord *Bacon's* beautiful observations on the duty of a judge, in his essay on judicature, beginning with "patience" and ending with "attention."

When called on this day for judgment, it appeared that Mr. *Swanston* had not considered that his observations were closed on the former occasion, the Court therefore called on him to proceed.

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Mr. *Swanston* :— Before the bankruptcy the bankrupt was subjected to certain liabilities in respect of a lease, and these were not destroyed by the issuing of the fiat. The assignees have, as I contend, elected to take the lease, and with it they take all liabilities attached thereto; thus the liabilities are transferred—not destroyed. If they were destroyed, the bankrupt lessor would be deprived of his property, and no one be answerable to him in respect of these liabilities. The assignees have elected in this case, for there may be acts which amount to an election, independently of the 75th section of 6 Geo. 4. c. 16.

Mr. *Richards* and Mr. *Spence* again declined making any observations.

Mr. *Swanston* spoke as to costs.

Mr. *Richards* and Mr. *Spence* insisted this case was argued as if on a demurrer; and that, if the Court allowed the demurrer, the costs would be of course, as they constantly were in equity under such circumstances.

Mr. *Swanston* replied.

The CHIEF JUDGE :— The questions are, 1st, Whether we have jurisdiction to make the order on one of the respondents as assignee, it being admitted, that if he were only bound as a private person the remedy would be in another Court? 2d, Whether, if we have jurisdiction, this be a case for our interference?

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Sir *John Cross* : — The *parties* are assignees, officers of the Court; the *property* that of bankrupts; the *question* one of election under a bankruptcy. Surely we have jurisdiction in a case so situated?

Sir *George Rose* : —

I take this opportunity of making a few observations as to the costs. In this case the contract was after bankruptcy, consequently the parties do not stand on their character as assignees. The jurisdiction of the Court in this case is under section 15 of 6 Geo. 4. c. 16. All the courts have ever done under that section was to give time to the assignees to elect; and if they declined to take the lease, the jurisdiction was so entirely at an end that the courts could not even give costs, they not being mentioned in the act. (a) I at present think there is no jurisdiction, and that if there were this would not be a case for its exercise. The liability is personal to the assignee. Suppose he were to die, how could we deal with his heirs or executors? Suppose him removed, how then could we act? But granting that we had jurisdiction, this petition is for an order on all three assignees. One of them, *Slatter*, has done certain acts, but they do not bind the other assignees. There is another objection: in order to enforce specific performance, the rules of equity require, either a memorandum in writing to satisfy the statute of frauds, or part performance; there is neither in this case.

The petition thus breaks down for want of either jurisdiction or merits, and the question resolves itself into one of costs. As this is a question between two insolvent estates, I had hoped that it might be so arranged that the whole costs might fall on neither, and that *Slatter*

(a) *Ex parte Bright*, 2 G. & J. 79.

would adopt the agreement, which he is willing to do. This unfortunately has not been done. What principle is to govern as to costs? The general rule is, that when parties, assignees or others, fail, they must pay costs; and there are not any circumstances here to influence our equitable discretion to make this case one of exception, the petitioners breaking down both as to jurisdiction and merits. But a very influential circumstance remains. This is really the petition of a mortgagee, in whom is vested the whole of *Oldham's* interest, and who is the demising party in the lease, the assignees only concurring, and to which mortgagee all rent and benefit is reserved.

As there is no jurisdiction, and no shadow of merits, I am of opinion that this petition ought to be dismissed, and that costs ought to follow, when it is so improperly presented, followed up, and with such an intent.

Curia advisare vult.

The CHIEF JUDGE:—

This is a petition by the assignees of *Thomas Oldham*, a bankrupt, praying that the assignees of *John Edge*, a bankrupt, may be directed to accept and execute a lease in the form set out in the petition, or that it may be referred to the proper officer to settle such a lease as they ought to accept, regard being had to the agreement between the two bankrupts, as set out in the petition.

The reference to the covenants to be introduced into the lease marks this instrument as a mere agreement, and shows that it was not intended to operate as a present demise; and accordingly it appears, by the statement in the petition, that *Edge* gave instructions to *Oldham's* solicitor to prepare a lease pursuant to the terms of the agreement, and that a draft lease was pre-

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pared accordingly, and sent to *Edge's* solicitor for approval.

In the meantime *Edge* was let into possession of the premises under the agreement, and continued to occupy them down to the time of the bankruptcy, but no lease was ever executed.

On the 15th March 1831 a commission of bankrupt was issued against *Oldham*, under which the petitioners were appointed assignees.

On the 24th June following *Edge* also became a bankrupt, and the respondents were appointed assignees. It is further stated by the petition, that the assignees of *Edge*, immediately after his bankruptcy, entered into the possession of the premises, and that *Slatter*, as one of such assignees, has ever since carried on the bankrupt's business of calico printer upon the premises, for the benefit of *Edge's* estate; and that *Boothman*, another of the assignees, had supplied the premises with coals, and that either the assignees, or *Slatter* on their behalf, had paid the rent mentioned in the agreement.

It will tend much to simplify the question in dispute, if, before I allude to the other circumstances stated in the petition, I stop here to consider what was the position occupied and the responsibility incurred by the assignees under the facts already mentioned. By taking possession of the premises they had clearly adopted *Edge's* tenancy. It is material, therefore, to ascertain what was *Edge's* situation at the time of his bankruptcy. At law he was a mere tenant from year to year, upon the terms specified in the agreement; his assignees, therefore, having taken possession, would stand in the same relation to the landlord, and as such would be liable at law for the rents, and the consequences of such tenancy.

In equity, which considers what is contracted to be

done as done, *Edge* would stand as lessee for fourteen years, subject to be called on to give a legal effect to his liability as such by the acceptance and execution of a formal lease, according to the terms of the agreement. In equity, therefore, the respondents' relation to the lessor would be that of assignees of his lessee, involving them in the same responsibility that would have resulted from a lease actually granted to *Edge* before his bankruptcy, and adopted by them, in which case their liability to the payment of rent, &c., and the performance of the other covenants of the intended lease, would only endure so long as the property remained in their hands; and upon a sale and assignment of the bankrupt's interests they would be released from all further responsibility.

The only reasonable application against them, as assignees in possession of premises thus situated, would be, to compel them to take the term contracted for upon the same conditions as would have attached to them if the lease had been actually executed before *Edge's* bankruptcy, and they had elected to adopt it.

But this application by the petitioners is of a very different character; and when it was distinctly asked of their counsel whether they would be satisfied with an order that would bind the respondents to that extent, they as distinctly answered in the negative, and pressed for a lease to the purport of the draft set out in the petition.

By that draft the demise is proposed to be by the mortgagees, by the direction and appointment of *Oldham* and his assignees, to the respondents, their executors, administrators, and limited assigns; and the covenants for payment of rent, for repairs, and not to assign without leave, are expressed to be by the respondents, for themselves, their heirs, executors, administrators, and

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assigns; thus rendering themselves and their personal representatives responsible for the fulfilment of all the covenants for the whole term of fourteen years, even after they should have sold it, as they were bound to do, for the benefit of *Edge's* creditors: a proposal too unreasonable to be entertained by any court. But it was urged in argument, that the respondents had expressly agreed to take a lease to themselves upon their own personal responsibility, upon which two questions arise: first, whether, assuming every allegation on the face of the petition to be true, any such agreement has been made out in fact? and second, if made out, whether this Court has power to enforce it?

I should very much question the jurisdiction of this Court to enforce the performance of any such agreement, if it had been established by the clearest evidence, because the responsibility thus incurred by the personal engagement of the respondents seems to me a fitter subject for a bill in equity than a petition in bankruptcy.

But it is unnecessary to discuss this question further, because I am satisfied that there is no allegation in the petition of any agreement under which the respondents ought to be compelled in any court to accept and execute any such lease as that suggested by the petitioners.

The only statement pointing to such an agreement is the allegation that *Slatter* represented that the assignees had determined to take the lease of the premises. What lease? Does it necessarily follow that a lease to the assignees, binding them personally to the covenants for the whole term, was intended? Is it not more reasonable to suppose that a lease commensurate with their interest and liabilities as assignees was all that was required?

The landlord indeed might not be bound to grant any such lease, and might have put an end to the tenancy by a regular notice to quit, or might have applied to the Court under the provisions of the 46th section of the Bankrupt Act.

But suppose *Slatter* had expressly said that the assignees would take a lease to themselves, and personally bind themselves by the covenants as lessees, where is the evidence that *Slatter* had authority thus to bind his co-assignees?

There is no admission by them of their assent; there is no evidence of it; possession was not taken under any such agreement; *Slatter* was already in the occupation of the premises, and there is no one fact stated in the petition from which any inference of the assent of the other two assignees to any such arrangement can be fairly drawn. Assuming, therefore, for the Court the widest range of jurisdiction, and taking every fact stated on the petition to be true, there is no case established for calling on the respondents to accept such a lease as that now tendered. The petition must, therefore, be dismissed with costs.

Sir John Cross :—This case involved two questions; one as to jurisdiction, the other as to the merits. The question of jurisdiction was disposed of before, and the case stood for judgment on the merits: these are embodied in the petition, and the point is, whether on the face thereof the petitioners are entitled to relief. After a careful perusal of the petition, I am of opinion that the petitioner is not entitled to relief on the merits.

Sir George Rose :—I have already delivered my opinion at the close of the argument.

Petition dismissed with costs,

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Ex parte MILLINGTON.—In the matter of
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When the commissioners have exercised their judgment with respect to a proof of debt, and have refused to admit it, the successful petitioner against their decision is not entitled to costs, it being a general rule that costs cannot be so given when commissioners exercise their jurisdiction.

THE commissioners had refused to order a sale of mortgaged premises, on the ground that the mortgage debt was usurious; the mortgagee petitioned against this decision. (a) The petition was ordered to stand over to give the petitioner an opportunity of trying an action at law. He succeeded at law. The assignees offered to pay the principal and interest, and all the costs incurred after the order made upon the petition. This was an application for the costs of the petition of appeal from the decision of the commissioners.

Mr. *Swanston* and Mr. *Quin*, for the applicant, submitted, that as the general rule with respect to costs not being allowed against the decision of the commissioners no longer existed (b), it was but just that the petitioner should not be at the expense of the costs which had been incurred by the mistake of the commissioners; and that such costs ought, therefore, to be allowed out of the estate.

Mr. *Montagu*, *contrá*, was stopped by—

THE COURT:—Who said, that although in particular cases where the commissioners had not exercised jurisdiction the general rule had been relaxed, it was never intended that the general rule should be annihilated. That in this case the commissioners had very anxiously exercised their jurisdiction. And as far as appeared on the proceedings, the debt was, to say the least, very doubtful.

Application dismissed with costs.

(a) The petition was heard the 5th of July 1833.

(b) See 1 *Mont. & Greig*, 301; and *ex parte Fisk*, *Mont. & Mac*. 93.

Ex parte HARDING.—In the matter of BARRATT.

C. R.
Dec. 21,
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MR. MONTAGU moved to advance a petition for leave to prove, which had not been answered, the dividend meeting being on the 9th of January 1834, and the Court not sitting before the 11th of that month.

Petition not served cannot be advanced.

Per Curiam :—The Court will not advance a petition not yet served. The petitioner should get the petition answered, and served, and then he may apply to the registrar, who will communicate with the Judges, and, if necessary, they will appoint a special sitting for the hearing.

Ex parte CARTER.

C. R.
Jan. 12,
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IN this case a joint certificate had been duly signed, after which one partner died. This was an application that it might be advertized and allowed as the separate certificate of the survivor. In *ex parte* Cossart, 1 Gl. & J. 248., a similar order was made by Lord Eldon.

A joint certificate is, upon the death of one of the bankrupts, a separate certificate.

Ordered. (a)

(a) And see *ex parte* Currie, 10 Ves. 51.

C. R.
Jan. 27,
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The application to stay the advertisement in the Gazette will not be heard unless the proceedings be in Court, or, as it seems, unless there be a very strong affidavit of solvency.

Ex parte POWNALL.—In the matter of POWNALL.

MR. G. RICHARDS for the bankrupt. This is a motion to stay the insertion of the adjudication in the *Gazette* (a). The bankruptcy was found, on the 25th, at Ipswich, consequently this application is as prompt as possible. The bankrupt swears there is no petitioning creditor's debt, and denies that he has committed any act of bankruptcy. [Sir George Rose :—The proceedings are not in Court, consequently we cannot act.] This is an application by the bankrupt, who cannot produce the proceedings. In the late case of *ex parte Fletcher*, 1 *Dea. & Ch.* 90, 317, and 327, the advertisement was stayed, though the proceedings were not in Court.

The following cases were also cited in support of the application : *ex parte Foster*, 1 *Rose* 49 ; *ex parte Proston*, *ibid.* 259 ; and *ex parte Fletcher*, *ibid.* 336.

THE CHIEF JUDGE :—This application is made on an affidavit that there is no petitioning creditor's debt, and no act of bankruptcy. There must be some affidavit of the existence of both on the proceedings. It, therefore, becomes a question to which evidence are we to give credence? and how can we decide that, without seeing and considering the affidavits on the proceedings? If we saw the proceedings, and found the depositions good on the face of them, I do not think this Court would stay the insertion of the adjudication on the mere contradiction of the bankrupt. According to my recollection, the Court never interferes to stay the insertion,

(a) See 6 Geo. 4. c. 16. s. 25.

but where there is no act of bankruptcy on the face of the proceedings, or where there is a very strong affidavit showing that there was no act of bankruptcy. In the case before Lord *Eldon*, his Lordship stayed the insertion till he saw the proceedings; and when he did, found there was no act of bankruptcy. This application is supported only by the affidavit of the bankrupt himself, and is a mere question of evidence. Besides the affidavit is not positive as to his solvency. Upon the whole, therefore, it appears to me that we ought not to interfere. We will never do so, unless it be clear upon the proceedings that there is no act of bankruptcy. Though Lord *Eldon*, in *ex parte Foster*, did suspend the insertion in the *Gazette*, yet he says, "It appeared to me from the first that nothing could be more delicate than the question whether I ought to interfere between the adjudication of the Commissioners and the insertion of the advertisement in the *Gazette*; and if it were clear on the proceedings that there had been an act of bankruptcy I should hesitate a very long while before I should so interpose my authority."

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Sir *John Cross* :—I wish I could listen to this application, but there is not a distinct affidavit of solvency, and therefore it is not advisable that the Court should interfere. I wish to observe that the cases before the Lord Chancellor are open to this observation, that the Lord Chancellor had no power to reverse the adjudication, which this Court possesses.

Sir *George Rose* :—The act of parliament declares that an advertisement of the adjudication shall be inserted in the *Gazette*; it would therefore be a very strong act in any Court to interfere to prevent this in the face of an express enactment, unless in a very

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clear case. *Fletcher's case*, 1 *Dea. & Ch.* 90, 317, was a deviation from the general rule, and under very special circumstances. The point which there induced the Court to interfere was fraud, which was not sufficiently noticed by the reporters at page 90, though it was at page 317.

This is not a case in which the Court will interfere, and I very much doubt our jurisdiction so to do in a case like the present.

Mr. *E. Chitty*, as *amicus curiæ*, referred to *ex parte Ainsworth*, 2 *Gl. & J.* 89, where Lord *Eldon* refused, there not being a clear defect in the requisites on the face of the proceedings.

Application refused.

Court of
Bankruptcy.
Second
Subdivision
Court.

Nov. 30,
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Where the bankrupt had given an indemnity bond, and the amount of damage was not ascertained when the fiat issued, there is no debt provable.

Ex parte SIR C. MARSHALL and another, Sheriffs of Middlesex. — In the matter of FOX.

IN this case, which is reported *Mont. & Bi.* 242., a claim was ordered to be entered by the Court of Review. When the creditor applied to the commissioner to mature his claim into a proof, the question was, on the 23d of November, referred to and argued before a Subdivision Court, consisting of Mr. Commissioner *Merivale*, Mr. Commissioner *Fonblanque*, and Mr. Commissioner *Holroyd*, and on this day the commissioners delivered their judgments *seriatim*.

MR. COMMISSIONER MERIVALE :—

The case on which we have to decide arises out of an application to prove, under the 56th section of the

statute 6 Geo. 4. c. 16., on the happening of an event, which, while it rested in contingency, was held by us incapable of proof according to the true construction of the act. Upon a petition to the Court of Review, in nature of an appeal from our decision, it seems to have been considered, that although then incapable of being proved, the demand was of such a nature that it might subsequently become the subject of proof; and it was on that ground ordered to be received as a claim, without prejudice to the ultimate right to prove upon the happening of the contingency. That event has since taken place; the proof has been tendered; and, after hearing what has been alleged by way of cause shown against its being admitted, the commissioners thought it due to the superior court, in consideration of the doubt thus raised, to take time to re-examine the authorities upon which their former judgment was founded, with reference especially to the now altered state of circumstances. That duty has been performed; and we are now prepared to give the reasons for which we individually think ourselves bound to decide agreeably to our first impression.

The Commissioner then stated the circumstances of the case as they are to be found in the report, *Mont. & Bli.* 242; and proceeded as follows:

The Sheriff's petition came on to be heard shortly after it was presented; and it appears from the report already referred to, that the case mainly relied upon in support of it was that of *ex parte Myers*, *Mont. & Bli.* 229., then recently decided by the same Court, to the effect "that a debt on a guarantee, which had not become absolute before the bankruptcy, is a debt proveable under the 56th section;" and by comparing the words of the section with those of section 53, relating to bottomry and respondentia bonds, it was likewise contended, that the words used

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in the beginning of the section were intended, "not to limit, but to extend, the right given by the subsequent part of the clause, by admitting a proof even before the contingency had happened," involving, it was insisted, the necessity of ordering a dividend to be retained until it should be ascertained to what extent the claimant was damnified. To this opinion it should seem that the Court was also inclined, in ordering the claim to be entered for 1,000*l.* (the amount of the verdict and costs), reserving a dividend ; and the reasons assigned for making such order were (in the language of the report) to the effect following :—The Chief Judge saying, "It is quite clear that on the face of this petition the Court cannot now determine the question of proof, for the bond was not forfeited before the fiat ; and at the time of tendering the proof the amount of the verdict had not been paid ; but inasmuch as the damage is irchoate it is but a fair protection that a claim should be entered."

Now, the only remark on this decision which I think it necessary at present to make is, that, if the reasoning on which it is founded be correctly reported, the result would be, that in all cases of liability depending on remote and uncertain events, the funds which ought, but for such liability, to be distributed among the body of creditors, would be required to be locked up, to an amount proportioned to the nature of the liability, for an indefinite period—a consequence wholly at variance with the present spirit of the bankrupt laws, never (as we say) contemplated by the legislature, and fraught with mischief, of which the present case affords a striking illustration, inasmuch as the claim ordered to be entered was for 1,000*l.*, (and it might as well have been for 2,000*l.*, the whole penalty of the bond,) when the whole amount to which the sheriff has turned out in the

event to be damnified, and which he now seeks to prove, is 600*l.*, and it was then wholly uncertain whether he would ever be damnified to the extent of one farthing.

With regard to the supposed analogy, dwelt upon by one of the learned Judges (Sir *G. Rose*), to the case of an executor, who would, he conceives, be restrained from distributing the assets while such a bond remains in existence, I apprehend that it is met by the contrary doctrine laid down so long ago as in *Harrison's case*, 5 Co. 28 b., to the effect "that a debt due by bond shall be paid before a statute made to perform covenants, when none are, or perhaps ever will be, broken;" a doctrine fully recognised in many subsequent cases, as in *Hawkins v. Day*, Amb. 160, where it was held by Lord *Hardwicke*, that "the payment by an executor of a simple contract debt before a breach of condition of a bond entered into by his testator was good, and no *devastavit* in case of a deficiency of assets." And in the more recent case of *Simmons v. Bolland*, 3 Mer. 547, where Sir *W. Grant*, on a bill by a residuary legatee for the transfer of a fund retained by the executor for the purpose of protecting himself against any future demand in respect of covenants entered into by the testator, ordered (there being no existing breach of such covenants) that the fund be transferred as prayed, on the plaintiff's giving a sufficient indemnity; but which indemnity would clearly not have been requisite but for the distinction taken by Lord *Hardwicke* (in the case last before cited) between simple contract debts and legacies.

Then, with respect to the other position assumed by the same learned Judge (Sir *G. Rose*), "that the present case is not to be looked at as that of a

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mere indemnity bond, since, in consideration of the bond, the sheriff parted with the goods which he might have retained, and therefore that it may be difficult to say that, independent of the bond, he would not be entitled to prove for the value," it appears to me not well founded, inasmuch as the goods were not those of the sheriff, but were claimed by the assignees as part of the bankrupt's estate, and would therefore never have been taken by them as a consideration for the bond; or by way of purchase. So also, on the part of the sheriff, it was not the goods (for they were not his own), but the risk he incurred in parting with them, for which he consented to accept the bond as an equivalent; and, setting aside the question of debt or no debt, this risk was utterly incapable of being made the subject of valuation. Again, and supposing even that the goods could be considered to have been parted with by the sheriff in consideration of the bond, they were so parted with, not to *Fox* only, but to *Fox* and *Frasi* jointly; and would, on that account alone, be incapable of becoming the subject of proof under *Fox's* separate commission.

I have thought it necessary to say thus much by way of comment on this decision, because it is difficult to imagine how the order made by the learned Judges can be supported, except upon a principle wholly at variance with that which has been already adverted to as the result of all the authorities; namely, that in order to establish a proof under this 56th sect. there must be a debt contracted, and actually existing at the time of the bankruptcy; an allegation which cannot, I apprehend, be sustained with respect to a demand of the nature of that in question.

That this was the state of the law previous to the 6 Geo. 4. c. 16. will not be disputed; and we have the authority of one of the first expounders of that statute, who is also understood to have been principally instrumental in framing its several enactments, that it was the intention of the legislature to preserve the law in this respect unaltered (a), an assertion confirmed by a series of decisions so clear and uniform that it is scarcely possible to find any doctrine more firmly established.

Thus, in the case of *Biré v. Moreau*, 4 Bing. 57, which appears to be the earliest on this clause of the statute, the bankrupt was held liable, notwithstanding his certificate, to be taken in execution for costs on a judgment entered up since the bankruptcy, although the verdict was previous, expressly upon the ground that such costs did not constitute "a debt contracted" within the statute; and in that of *Atwood v. Partridge*, 4 Bing. 209, where the defendant had covenanted for the due payment, by a third party, of the premium on a policy effected to secure a debt due from that party to the plaintiff, it was in like manner held that the case was not within the statute, "it not being a debt due from the defendant, but merely a claim for unliquidated damages."

Then what is the doctrine to be found as laid down by Lord Tenterden in *Boorman v. Nash*, 9 Barn. & Cres. 145, and *Yallop v. Ebers*, 1 Barn. & Adol. 698.; in the first of these cases his Lordship says, that the right of the plaintiff to maintain an action against a certificated bankrupt depended on the question

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(a) Lord Henley, *B.L.* p. 129. (last ed.)

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whether he could have proved his demand under the commission; adding, that it seemed impossible he could so have proved it, since, at the time the commission issued, it was uncertain, not only what amount of damages, but whether any damages at all, would be sustained; and in the latter case (*Yallop v. Ebers*) his Lordship held that there was "no debt" to which either of the specified clauses could be applicable

And in addition to and in confirmation of these authorities, following (as they do) in the train of an uninterrupted course of older decisions, we have that of the present Lord Chief Baron, upon a case so strikingly analogous to the present that it must not be passed over without particular notice; viz. *ex parte The Lancaster Canal Company, Mont. 27.*, where a joint and several bond in the penal sum of 20,000*l.* was given, conditioned (among other things) for collecting debts due to the company, and accounting for and paying over the balances when required. The obligors (who were partners in a banking-house) became bankrupt, and a proof was tendered on each of the separate estates for the amount of the balance due to the company at the time of the bankruptcy. This proof was rejected by the commissioners, whose decision was affirmed by the Vice-Chancellor, on the ground that the security of the bond having been waived by the nature of the dealings between the parties, the bankrupts were only jointly liable; and, on appeal to Lord *Lyndhurst* (then Chancellor), his Lordship again affirmed the decision, but on a different ground from that taken by the Vice-Chancellor, holding that there was no such breach of the condition as would constitute an existing debt so as to entitle the company to prove; and observing, further, that it could not be considered as a contingent debt under the statute,

because there was no debt existing; and it had been determined by the Court of King's Bench that to give a right of proof there must be an actual debt depending on the contingency.

There is, however, to be found in the books one, and that I believe a single, decision previous to the case of the *Lancaster Canal Company*, which is apparently at variance with this string of authorities. *Ex parte Lewis, Mont. & Mac. 426.*, where A. advanced to B. a sum of money on the security of the bond of C., conditioned for payment if B. should make default on a day specified. C. became bankrupt before the day; and his Honor held, that although default was not made till after the bankruptcy, yet this was a debt proveable under the commission. But this, it will be observed, was an engagement to pay a sum certain, on a given event, limited in point of time, and thus, in some measure, distinguishable.

I now come to two recent cases before the Court of Review; the first of which is *ex parte Thompson, Mont. & Bli. 219.*, where it was held, in strict conformity (as we apprehend) with the former decisions, that "where a surety for an annuity covenanted to pay in case default were made by the grantor, and the surety became bankrupt before default, the value of the annuity was not proveable as a contingent debt." And his Honor the Chief Judge, in delivering his opinion to that effect, employs the very words made use of by the Courts of Common Pleas and King's Bench, and repeated by Lord *Lyndhurst* in the several cases cited, when his Honor says, "that to entitle the party to prove by virtue of the 56th section, it must be made out that it was a debt contracted by the bankrupt, payable on a contingency; but that, in this case, there was no such obligation; it was not a debt con-

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tracted, but merely a collateral security, incapable of valuation at the time the commission issued."

The other case is that of *ex parte Myers, Mont. & Bli. 229*, where the question was represented (in support of the petitioner) to be, merely whether the surety had contracted "a debt" payable on a contingency, within the 56th section; and it was taken for granted that, previous to the statute, a debt on a guarantee which had not become absolute before the bankruptcy was not proveable, although (as it was agreed) the proof was prevented, not by the nature of the debt, as being on a guarantee, but because it was upon a contingency. And then, in answer to a question of one of the learned Judges (Sir J. Cross), "how this could be a debt, or capable of valuation, before the deficiencies were known?" the counsel for the petitioner is driven to a construction of the latter part of the section (which I consider to be wholly untenable), that a demand not proveable as a debt due on a contingency at the time of the bankruptcy might become proveable by the subsequent happening of the contingency.

It is unnecessary, however, to pursue this train of reasoning, or to inquire how far it influenced the Court in its decision, because I rest my opinion on the broad line of distinction afforded by the former cases; namely, that to constitute the subject of proof under this section there must be a debt actually contracted antecedent to, and existing at the time of the bankruptcy. But, from a note in a report of this same case by Messrs. *Deacon and Chitty* (2 *Dea. & Ch.* 251.), it should seem that the ground upon which one of the learned Judges (Sir John Cross) was induced to concur in the decision was different. It is there stated that "his Honor, Sir J. Cross, declined giving his reasons at the time, but afterwards intimated that his concurrence was founded

on the fact that the terms of the guarantee made the bankrupt a principal as well as a surety;" and to this it may be added, that this guarantee was (as in *ex parte Lewis, Mont. & Mac.* 246.) for a sum certain, to the amount of which the bankrupt might perhaps be said to have rendered himself primarily liable.

It seems that this question of debts payable on a contingency has been sometimes argued upon the ground that it was the professed design of the legislature to exonerate the bankrupt's estate from every species of future liability, by providing for its discharge under the commission; and this 56th section has been accordingly represented as introduced to meet every case of that description untouched by the four or five preceding clauses; that is, the 51st, relating to debts payable at a future time and on an event certain; the 52d, relating to sureties; the 53d, relating to bottomry and respondentia, &c.; and the 54th and 55th, relating to creditors by way of annuity, and their sureties. But I am of opinion that it is impossible to collect any such meaning, either from the language of the act itself, or from the nature of the evil which had been previously pointed out by those most conversant with the principles and practice of the bankrupt laws as calling for a remedy. That evil consisted in the hardship on many meritorious individuals, having an interest in the bankrupt's estate to an amount certain, although dependent on an event in its nature uncertain (as, for instance, that of survivorship), in being absolutely precluded from sharing with other creditors by the circumstance of the event not being determined at the time of the bankruptcy. And the particular class of creditors who were more especially marked as objects of the proposed remedy was that which has been always regarded as

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entitled to peculiar protection, viz. married women, infants, and other persons having an interest under wills or by marriage articles, whose situation was often rendered most deplorable by accidents against which no human foresight could have provided. This, as appears from the language of all the books on the subject of the bankrupt laws, and from Lord *Henley's* in particular, was the object which the legislature had most immediately in view in the introduction of the clause in question. It never was designed that the clause should be extended, by a fancied liberality of construction, to a variety of cases not within its literal scope and meaning. The very preciseness of the words and phrases made use of, “that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable on a contingency which shall not have happened before the issuing of the commission, the person with whom such debt has been contracted may apply to the commissioners to set a value upon such debt, and the commissioners are to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon:”—and then again, in the latter part, “or if such value shall not be so ascertained before the contingency shall have happened, then such person shall, after such contingency shall have happened, prove in respect of such debt” (that is, such debt as before mentioned—a debt contracted before the bankruptcy) “and receive a dividend, not disturbing former dividends:”—the very preciseness, I say, of these words and phrases expressly negatives such an inference. It is further negated by the consideration of the far greater evils which would ensue from the admission of the required construction, and its extension to cases of remote and indefinite liabilities. And if, after all, it

should be persisted in that such was the intention, our answer is, that the legislature has not expressed that intention—that *quod voluit non dixit*, and that we, as Judges bound to interpret the law, can only give effect to it as we find it expressly written.

My opinion accordingly is, that the proof now tendered must be rejected.

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MR. COMMISSIONER FONBLANQUE :—

I entirely concur in the opinion of my brother commissioner ; but as this is a matter of considerable importance, as affecting the law generally, as affecting sheriffs particularly, and as involving some hardship on bankrupts individually, we have deemed it expedient to deliver our judgments *seriatim*.

If the question were new we should only have to consider the general policy of the bankrupt law as affected by the statute 6 Geo. 4, but as similar subjects have frequently been discussed in the several courts, and there appears some contrariety in their decisions, it will be useful to look at the previous state of the law, and to trace the steps by which it has arrived at its present stage.

Previous to the 7th Geo. 1. no debt whatever was proveable, unless it were actually due at the date of the commission ; and this rule was so absolute, that even bills of exchange, unless payable before the date of the commission, were excluded. The inconvenience of this law became so obvious, that a statute passed to correct that evil, and bills and other securities payable at a future day were made proveable ; and thus the law remained till the 19th Geo. 2. when debts on bottomree and respondentia bonds, and policies of insurance, were let in.

Debts on annuities, when there had been no forfeiture previous to the bankruptcy, and the case of

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sureties, were not provided for till the 49th Geo. 3 ; nor bail, or what are called contingent debts, till 6 Geo. 4.

It is true that in all these enactments it was the obvious intention of the legislature to enlarge the remedy of the creditor, and to facilitate the discharge of the bankrupt ; and it is now contended, that the last of these statutes is to let in every description of debt or liability, and that the discharge of the bankrupt by his certificate is to be absolute. I cannot concur in that view ; the 6 Geo. 4. no more lets in every kind of contingent debt, however uncertain in amount or chances, than the 7th Geo. 1. let in policies of insurance, or 19th Geo. 2. let in bail. If the discharge were to have been as ample as contended at the bar by the counsel for the claimant, the legislature might have made one short clause suffice for every purpose, by adopting the word “ liability,” instead of framing six different clauses, all differently worded according to the exigence of their several occasions.

Leaving for the present this *vezata questio* of contingent debt, it must be observed that in all the cases provided for from the 51st to the 55th sections, excepting bottomree, respondentia, and policy cases, there is a debt, in a sum certain, existing previously to the bankruptcy ; but in respect of bottomree, respondentia, and insurances, there is an uncertain average to be taken in the event of loss, or there is an account of respondentia interest to be taken if the ship arrive : on these, therefore, there is a separate clause, which would not have been necessary if the 56th section would have covered all demands of uncertain amount payable on contingency. Thus the exceptions prove the rule ; in the 53d section there is no mention of debt ; in the 56th section the word debt is repeatedly used. Now “ debt,” as stated by Sir J. Cross in *ex parte Thompson, Mont. & Bli.* 219, “ implies, in all cases, a sum certain ;” a sum actually ascer-

tained,—not to be ascertained hereafter. The distinction between debt and damage has always been rigorously adhered to in bankruptcy,—that which is technically debt being proveable, that which sounds in damages being rejected. It might as well be contended that damages for an assault, the action being brought or the assault committed before the bankruptcy, and the verdict obtained after, would be a contingent debt proveable under the 56th section, as that this claim, which at the time of the bankruptcy depended, as to its amount, on the verdict of a jury, should be admitted.

Let us now look to decided cases. The view, that there must be an ascertained debt, (and not an uncertain demand or liability,) is sustained by all the authorities, legal and equitable, from the passing of the act (6 Geo. 4.) till the case of *ex parte Lewis, Mont. & Mac.* 426, which is supposed to be contradictory, and the facts of which have already been adverted to by my brother commissioner. The next case is *ex parte Myers, Mont. & Bli.* 229, and has already been cited and commented on. I need not recapitulate the numerous cases which support the doctrine, that in order to come within the 56th section there must be a debt existing and ascertained at the date of the commission. These have been already cited: the most remarkable are *Yallop* and *Ebers* (a) and *Boorman* and *Nash* (b) by Lord *Tenterden*; that of the *Lancaster Canal Company* (c) by Lord *Lyndhurst*, and *ex parte Thompson* (d) by the Court of Review. It might have been reasonably supposed that the three first authorities would have set the matter at

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(a) 1 *Barn. & Ald.* 698.

(b) 9 *Barn. & Cres.* 145.

(c) *Mont.* 27.

(d) *Mont. & Bli.* 219.

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rest ; but if they did require confirmation, it is abundantly to be found in the judgment of that Court whose peculiar province it is to decide in bankruptcy. *Ex parte Thompson* confirms, if confirmation were required, all the previous decisions, and clearly lays down the principles upon which contingent debts may or may not be proveable ; and as some of the expressions of the learned Judges who decided that case will apply peculiarly to the case before us, I will quote their own words.

“ The first step ” says the Chief Judge, “ is to ascertain whether any debt is contracted at the time of the bankruptcy : this is a mere engagement to become liable in case of default, till which no liability exists.” And Sir *George Rose* says, “ This is not a debt, but a covenant to become indebted.” It is only necessary to change the word “ default ” into the word “ damage,” and the judgment applies at once to the present case. *Fox* was not indebted to the sheriff, but he covenanted to become indebted in case the sheriff should be damnified by having a verdict against him in an action, not then brought, but which might be thereafter brought by *Mahony*.

Against this mass of authority there is the short case of *ex parte Lewis, Mont. & Mac.* 426, in the report of which however there is no detailed judgment ; and in which it must be observed there is a sum certain (2,000*l.*) to be paid on the contingency that the original debtor does not pay. *Ex parte Myers* certainly goes farther ; but admitting all the weight which can possibly attach to this case, I cannot consider it as overruling that of *ex parte Thompson*, and the numerous decisions on which it is founded.

Now if the uncertainty of the amount of a demand be a sufficient objection to proof, a *fortiori* must it be

an objection that it is uncertain whether any debt whatever will ever be demandable. Was there in this case any certainty that *Mahony* would bring an action? Was there any certainty that he would obtain a verdict? And, for another purpose essential to this inquiry, were there any data by which the most ingenious actuary could calculate the value of the chances, whether he would bring an action, whether he would obtain a verdict, and what would be the amount of the damages? But it is said that the event having happened, a value can now be ascertained; that is to say, a debt not proveable on Monday, for which the bankrupt was then liable notwithstanding his certificate, shall, by a subsequent act of other persons, become proveable on Friday. This is contrary to the whole principle of the bankrupt law, which fixes the relative liabilities of the estate and bankrupt by the date of the commission or act of bankruptcy.

How long are we to wait for the happening of these contingencies? "It is not," says Mr. Justice *Bailey*, "the intention of the legislature to lock up the property of the bankrupt upon the possibility that at some period or other some person may have a claim to it." Are we to wait six years, or twenty, or till the expiration of a lease where the bankrupt may be contingently liable for covenants?

Bankruptcy is a summary remedy, a *festinum remedium*: are we to wait the expiration of the time appointed by the statute of limitations before we proceed to that speedy distribution which it is the declared intention of the legislature to effect?

It is said, however, that it was also the intention of the legislature in the new statute (6 Geo. 4.) to give the bankrupt a complete discharge from all liabilities; if so, the legislature has been unfortunate in the expression of its will, for by using the single word "liabilities," which

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it has not used, it would have attained its purpose, and might have dispensed with the greater portion of six long sections.

Viewing this question in every point which occurs to me I cannot but come to the conclusion that this debt is not proveable. I come to that conclusion with regret, because it does appear to operate with hardship on the sheriff's officer in this case; it may operate with hardship upon many, by throwing an impediment in the way of taking this description of indemnity bond in the sheriff's office; and it may operate with yet greater hardship on this bankrupt, who, in doing that which was meritorious in his character of assignee of another estate, may have rendered himself personally liable notwithstanding his certificate. But we are bound to execute the law as we find it, without respect to individual hardship, and with that feeling I find myself bound to decide against the admission of this proof.

MR. COMMISSIONER HOLROYD :—

In consequence of a decision recently made in the Court of Review in the case of *ex parte Myers (a)*, which it is said ought to govern the present, and that Court having ordered a claim to be entered in this case for 1,000*l.*, I think it right to give my judgment, and the reasons upon which it is founded, more at length than I should otherwise have done.

In this case the Sheriff of Middlesex seeks to prove against the estate of *Fox* the sum of 600*l.* upon a bond.

The question as to the right of proof depends on the construction to be given to the 56th section of the 6 Geo. 4. c. 16.

By that section it is provided that if any bankrupt

(a) *Mont. & Bli. 229.*

shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are thereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

Now to bring a case within this clause there must be such a liability on the part of the bankrupt as can be included within the term "debt contracted by him previous to the issuing of the commission payable upon a contingency."

Upon the facts of this case, the question is, whether the terms used in the 56th section, namely, "contracting a debt previous to the issuing of the fiat payable upon a contingency," can, within the meaning of that clause, be construed to include a possible liability arising from being the obligor in a bond conditioned to indemnify another against contingent damages, which bond was not forfeited at the time of the bankruptcy? Can the bond in question be considered in any other light than as a bond of indemnity against contingent damages? It appears to me that it cannot. It is a bond given to the sheriff to indemnify him against any damage he may sustain by reason of giving up certain goods which he had taken in execution under a *fi. fa.*

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against a person who afterwards became bankrupt, and which goods were claimed by his assignees. Under this bond it was wholly uncertain at the time of the issuing the fiat whether the sheriff would ever sustain any or what damage; and this uncertainty did not rest merely upon the fact of an act of bankruptcy having been committed by *Sewerkrop* or not previous to the delivery of the writ, or at such a period as to invalidate the execution. The plaintiff might not have proceeded in his action against the sheriff, or he might have failed in recovering in such action, from various circumstances, either from not proving the judgment upon which the writ was founded, or from the goods seized not being the goods of *Sewerkrop*, or from *Sewerkrop* being a person whose goods were not liable to seizure; and yet, notwithstanding the uncertainty whether the sheriff would ever sustain any or what damage, the execution of this bond is called the contracting of a debt previous to the issuing of the fiat payable upon a contingency. Considering this point in every way that it can be put, having regard to the 56th section alone,—viewing it also in connexion with the other clauses in the act relating to proofs, and with reference to the current of authorities upon the subject, supported, as they appear to me to be upon the best consideration that I can give, by reason, law, and equity,—I think that the bond in question did not constitute “a debt contracted previous to the issuing of the fiat payable upon a contingency.”

First I will consider the point as if the 56th section were the only clause in the act relating to proofs, in addition to the 46th section, which is the general clause. Could it in such case be successfully contended that a contract to indemnify against contingent damages was a debt contracted payable upon a contingency? I think not. A party, by taking a security of this sort, does

not give credit for a sum of money to the person who enters into such security. The relation of debtor and creditor is not thereby raised between the parties. To constitute a debt, the substance of the contract must, I think, be to pay a certain sum of money. By the words of the 56th section it is the payment alone of the debt that is put in contingency, not the contracting of the debt; and putting this construction on the words of the section, the amount of the debt payable upon the contingency would be certain, though if the contingency had not happened, the then value of the debt would be uncertain according to the time of, or the probability or improbability of the happening of the circumstances upon which the payment of such debt was made to depend. The inconvenience and injustice to which a contrary construction would lead is great; and where is the line to be drawn? Suppose the case, as was well put on the part of the assignees, of a bond executed by a bankrupt in a large penalty, conditioned to guarantee the performance of covenants in a lease—a farming, mining, or a building lease. A future possible demand may arise on this bond during some period or after the expiration of the lease, which may be of any possible duration. Or suppose a bond given by a keeper of a prison, who afterwards becomes bankrupt, to the sheriff, to an amount largely exceeding all the debts proved against the bankrupt's estate, and conditioned for the safe keeping of prisoners in his custody. Actions might afterwards be brought against the sheriff for escapes, and on this bond the keeper of the prison might become liable to the sheriff for the amount of all damages recovered against him. Or suppose the penalty of the bond in question were 20,000*l.* instead of 2,000*l.*; and, instead of being confined to one levy of goods against *Sewerkrop*, had applied to several, and went to indemnify the sheriff against returning *nulla*

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bona to various writs under which different seizures of property of *Sewerkrop* had been made. Should a claim be entered, and a sum reserved for a dividend thereon, in respect of the possible demand on this bond?

Supposing a claim on such a bond to be entered for 5,000*l.*, and the proofs amount to 500*l.*, the assets being sufficient to pay on the proofs and claim 2*s.* in the pound. Thus 500*l.* would be locked up (sufficient to pay the debts proved 20*s.* in the pound), because it was possible that at some future period the whole or part of it might be claimed. A bond for the performance of covenants, or to do a collateral thing, may never be forfeited, it may lie in *perpetuum*, and so the assets would never be administered. Whereas the policy of the bankrupt law is to divide assets speedily; not to lock them up to meet future possible demands.

Again, if such a debt be proveable, it would also be discharged by the bankrupt obtaining his certificate, which he might do before any actual breach of the condition of the bond. The breach of the condition might not happen until two, three, or more years afterwards; the obligor might then be in good circumstances, and able to pay; but no, the certificate would then be a bar to any such claim.

But then it is said that looking at the Act of Parliament with reference to the sections preceding section 56, namely, those relating to debts payable at a future day, to sureties and bail, to bottomry bonds, respondentia bonds, and policies of insurance, and to annuities, that the object of the legislature, by section 56, was to relieve the bankrupt from all future liabilities that might end in debts. I cannot but think that the contrary is the more correct inference to draw from this. For if such were the intent of the legislature, why particularize the different liabilities from which a bankrupt is to be discharged in six sections, where one short

clause might have been made applicable to all: and moreover, if this extended construction be the right one, the term "debt" in the 56th section would embrace much more than the term mutual credit in the 50th section, which would be contrary to all the authorities.

By the 50th section it is provided that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioner shall state the account, and one debt or demand may be set against the other.

Now the term "mutual credit," both on the former statutes and the present, has been held to mean something more than the words "mutual debts" import. It has been held that a mutual credit may be said to exist where there are transactions between a bankrupt and other parties which will necessarily end in debts. This will appear by the cases of *Rose v. Hart*, 8 Taunt. 499; *Sampson v. Barton*, 2 Brod. & B. 89; *Collins v. Jones*, 10 B. & Cr. 777; and *Rose v. Sims*, 1 B. & Ald. 521. But it has also been held that a contract to indemnify upon a contingency, or to do a collateral act, would not operate as a mutual credit; *a fortiori* such a contract cannot operate as a debt.

In *Simpson and others v. Burton*, 2 Brod. & B. 89, the defendant (*Burton*) had sold and shipped a quantity of gunpowder to a person of the name of *Andrews*, which was received into the magazine of *Cook*, a warehouseman, by the direction of *Andrews*. The vendor, suspecting the insolvency of the vendee, wrote to *Cook*, the warehouseman, desiring him to detain the powder, and guaranteeing him against all loss from so doing. *Cook* retained the powder and delivered it to the vendor. The vendee afterwards sued *Cook*, the warehouseman, in trover for the powder, obtained judgment, and levied execution on his goods. *Cook* became bankrupt, being

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at the time indebted to the vendor (*Burton*) ; and in this action, which was brought by the assignees of *Cook* against *Burton* on the guarantee, it was held that the guarantee did not constitute a mutual credit with *Cook* so as to enable the defendant *Burton* to set off the money due to him from *Cook*. In this case *Burrough*, J., said, "The intention was to confine mutual credit to pecuniary demands, or to those subjects which at some subsequent period might become of a pecuniary nature. Now look at this case, has it the semblance of a pecuniary demand? It is a mere guarantee, on which there is only a contingent claim for unliquidated damages ; and here, before verdict given, is an attempt to call it a mutual credit." And *Richardson*, J., says, "By the last decision as to mutual credit, the doctrine has properly been confined to goods deposited with the view to a sale, the proceeds of which should form an item in an account. The present case goes much further, for it is only a contract to indemnify upon a contingency ; and *Glennie v. Edmunds*, 4 *Taunt.* 775, is directly opposed to such an extension of the doctrine of mutual credit." So in the case of *Rose v. Sims*, 1 *B. & Ald.* 521, *A.* having given defendant his acceptance for 20*l.*, defendant in consideration thereof undertook that he would indorse to *A.* a bill drawn by him (defendant) on *E.*, payable to defendant's order ; he gave the bill but would not indorse it. On assumpsit brought by the assignees of *A.*, who had become bankrupt, and whose acceptance was dishonoured, Held, that the contract to indorse was not a subject of mutual credit within 6 *Geo.* 4. c. 16. s. 50, and could not have been set off by the assignees against the 20*l.* due from *A.* to the defendant. *Parke*, J., says, "This is not a case of mutual credit within the Bankrupt Act ; it is merely a case where the cause of action arises for the non-performance of a contract. The provision with respect to mutual credits is confined to debts

between the bankrupt and other parties, or to transactions necessarily ending in debts." And *Taunton, J.*, says, "A mutual credit may be said to exist where there is a debt, or something which will end in a debt. Here neither was shown, but only a cause of action, namely, the failure of the defendant to indorse pursuant to his engagement. Immediately upon that failure a right of action accrued to the plaintiff, but not a debt. The damages were unliquidated, and their amount dependent on circumstances."

These cases show that a contract to indemnify upon a contingency, or to do a collateral act, does not constitute a mutual debt; and therefore I say such a contract cannot constitute a debt; which term has not so extended a signification as the term credit.

The circumstance of the contract in the present case being by a bond with a penalty, makes no difference; because, as observed by *Holroyd, J.*, in *Taylor v. Young*, 3 B. & A. 529, "In the case of a bond with a penalty, the penalty is not the debt actually proved; but that which is proved by reason of a penalty is that which can be valued as a debt." But here there was nothing that could constitute a debt, for the reasons I have before stated. Authorities, however, are not wanting as to the true construction to be put on the 56th section; in *Yallop v. Ebers*, 1 B. & Ald. 698, the defendant undertook to pay the balance due on a bill of exchange, of which the plaintiff was the acceptor; and afterwards, by a new undertaking, engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it. Defendant became bankrupt, and did not pay or indemnify; and the plaintiff was obliged to take up the bill, the bankrupt having then obtained his certificate. In an action brought for the breach of promise, Held, that the plaintiff could not have proved in

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respect of it under the defendant's commission; and in that case Lord *Tenterden* says, "By statute 6 Geo. 4. c. 16. a bankrupt may be discharged from all debts due at the time of the issuing the commission, all that are certain to become due at a future time, and all that may or may not become payable by the bankrupt at a future time: in the latter case where the contingency has not happened before the issuing of the commission, the commissioner may ascertain the value and admit the party to prove; or if the contingency has happened before the value is ascertained, the demand then stands as if it had been *debitum in presenti solvendum in futuro*, and the creditor may prove in respect of such debt, and receive dividends; but it appears to me that there was no debt between the present defendant and the plaintiff to which one of these clauses could be applicable."

From this case it is clear, that to entitle a party to prove by virtue of the 56th section there must be a debt contracted previous to the issuing of the fiat, payable upon a contingency, and that a contract of indemnity is not such a debt.

The same law is to be deduced from the cases of *Boorman v. Nash*, 9 B. & Cr. 145; *Hoffman v. Fourdrinier*, 5 M. & S. 21; *Attwood v. Partridge*, 4 Bing. 209; *Taylor v. Young*, 3 B. & Ald. 521; *ex parte Tindal*, 8 Bing. 402; *ex parte Thompson*, 1 Mont. & Bligh, 219; and *ex parte The Lancaster Canal Company*, Mont. 27.

In the cases of *Taylor v. Young* and *ex parte The Lancaster Canal Company* the undertakings were by bond, with a penalty, as is the present. Then as to the case of *ex parte Myers*, Mont. & Bligh, 229, the contract there was not to indemnify against contingent damages, but an absolute engagement by the bankrupt, that he the bankrupt, or certain other persons (named), should provide for the payment of certain bills to the extent of

12,000*l.* So in the case of *ex parte Adney*, *Cowp.* 426, and *ex parte Lewis*, *Mont. & M.* 426, the bankrupt undertook to pay a sum certain in case his principal failed to do so. It is unnecessary for us to decide whether such undertakings are debts payable upon contingencies within the 56th section. We say that a mere claim for unliquidated damages, which cannot be settled without the intervention of a jury, is not such a debt.

I have only further to observe, that I regret that I cannot concur in what appears to have been the inclination of the opinion of the Court of Review in this case, by ordering a claim to be entered for 1,000*l.*, and a dividend thereon to be reserved. The question, however, as to the right of proof still remains open. In the report by Mr. *Montagu* of what took place before the Court of Review, Sir *G. Rose* is stated to have said, that a Court of Equity would not permit executors to divide the assets whilst such a bond as this existed. I should be slow to express any opinion on a point of equity differing from his Honor Sir *G. Rose*, whose knowledge and experience in such matters is so extensive. But supposing this be the proper test to try what debts are proveable under bankruptcies, (bearing in mind that debts proveable are entirely the creature of an act of parliament,) I cannot find authorities in support of the proposition; but I do find authorities for this, — that a simple contract debt, both at law and in equity, would be entitled to priority over a future contingent claim for unliquidated damages, though secured by bond with a penalty; *Harrison's case*, 5 *Co.* 286; *Hawkins v. Day*, *Ambl.* 160; and *Nector and Sharpe v. Gennet*, *Cro. Eliz.* 466. As respects a residuary legatee, a court of equity would order a sufficient indemnity to an executor against such a claim, on the funds being paid over; *Simmons v. Bolland*, 3 *Mer.* 547.

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Sir George Rose is stated to have further said, "it is difficult to say that, independent of the bond, the sheriff is not entitled to prove for the value of the goods." I cannot bring my mind to the conclusion, that such right of proof could arise. Independently of the bond, the case would stand thus: the sheriff takes certain goods in execution, which are claimed by a third party; he gives them up, and returns *nulla bona* to the writ. Now it has been decided, even in the case where goods seized in execution by the sheriff have been taken from him by a third party by force, that the sheriff, after returning *nulla bona* to the writ, has no remedy against the taker of the goods, for the sheriff, by returning *nulla bona*, whereby he declares that he never had rightful possession, disclaims all interest in the goods. In an action against the sheriff for a false return, after he had taken goods in execution, which had been forcibly taken out of his possession, and carried away by a person claiming property in them, such person was admitted to prove that they were not the property of the debtor against whom the execution had issued, upon the ground that the sheriff could not maintain an action against him, the witness, for the rescue or for the value of the goods, after having made such a return, and that therefore the witness had no interest in supporting the sheriff; *Thomas v. Pearce*, 5 Price, 547. And in *Underwood v. Mordant*, 2 Vern. 237, it was held, that in an action against the sheriff for a false return of *nulla bona*, if the plaintiff recover damages against him, the verdict does not vest the property of the goods in the sheriff, but they remain in the party, and are liable to any other execution. The sheriff therefore could have no right of proof for the value of the goods; and besides, the goods were given up to Fox and Frasi, and therefore supposing the sheriff had any claim independent of that arising on

the bond, it would be against *Fox* and *Fras*i jointly, and not against the separate estate of *Fox*.

Upon the whole, I think the demand of the sheriff is not proveable, upon the ground that there was no debt contracted at the time of the issuing of the fiat, payable upon a contingency within the meaning of the 56th section.

It becomes, therefore, unnecessary for me to consider the other point raised in the argument; namely, that the debt contracted must be capable of valuation at the time of the issuing the fiat, and that, if not capable of valuation at the time of the issuing the fiat, it could not be proved under the second part of the 56th section, after the contingency had happened.

Proof rejected.

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THE sheriff having seized goods claimed by assignees as part of the bankrupt's estate, consented to give them up on receiving an indemnity bond from the assignees, and returned *nulla bona*. An action was thereupon commenced against the sheriff for a false return, and a verdict for 800*l.* was recovered. Pending the action, one of the assignees became bankrupt, and the Court of Review ordered a claim to be entered on behalf of the sheriff. The case thus far is reported, *Mont. & Bli.* 242. The sheriff afterwards applied to have the claim matured into a proof. The Subdivision Court rejected the proof. (a) This was a petition appealing from the decision of the Subdivision Court.

Where the bankrupt has given an indemnity bond, and the amount of damage is not ascertained when the fiat issues, there is no debt proveable.

(a) *Supra*, 118.

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Mr. *Swanston* and Mr. *Bethell* for the petitioners :—

The leading intent of the legislature was, that while on the one hand the bankrupt was divested of all his property, on the other hand he should be relieved from all liabilities.

At the bankruptcy there existed a contract, which, though it was called into active operation by the happening of the contingency, was not founded on the contingency. If the bond had been forfeited before the bankruptcy, it has been clear, ever since the time of Lord *Hardwicke*, that it would be proveable. *Ex parte Winchester*, 1 *Atk.* 116, cited in *ex parte Rowlatt*, 2 *Rose*, 418. (a) The case unprovided for was where the bond was not so forfeited; consequently, if this debt be not proveable under section 56, then the very case which required provision is not provided for, and the section may be considered as a nullity. On referring to the sections in *pari materia* it is found, that section 52 enables sureties and others liable to the debts of the bankrupt to prove after having paid such debts; section 53 enables persons having bottomree or respondentia bonds or policies of insurance to claim, and, after the loss shall have happened, to prove; sections 54 and 55 enable grantees and sureties for annuities to prove; and then section 56 provides for two additional cases, and might have been two distinct clauses, one where the contingency occurs before the issuing the commission, the other where it does not happen till afterwards.

The late case of *ex parte Myers*, *Mont. & Bli.* 229, is conclusive in favour of the petitioner, it having there been decided, that a debt on a guarantee not absolute before the bankruptcy was nevertheless proveable as a contingent debt.

(a) But see *ex parte Rainer* in *Rowlatt v. Rowlatt*, 1 *Jac. & Walk.* 280.

[Sir *John Cross* : — The whole question resolves itself into this, whether the bond were forfeited at the time of the act of bankruptcy? A point not unlike the present arose in *Challoner v. Walker*, 1 *Burr.* 574.

The CHIEF JUDGE : — In that case a damage had actually been incurred when the bond was put in suit. Here the petitioner had not incurred the slightest damage or expence before the issuing the fiat.]

There existed a verdict on which judgment eventually went against the petitioner, which is a damnification. It is immaterial whether or not the bond were forfeited, because the giving up the goods furnishes sufficient consideration to support the proof.

Mr. *Twiss* and Mr. *Rogers* for the assignees : —

An erroneous opinion prevails, that a conflict exists in the present case between this Court and the Subdivision Court : such is not the fact. This Court refused to give any opinion as to the proof which the Subdivision Court rejected. First, nothing is proveable under section 56, unless it be an actual debt antecedent to the commission ; and, second, it must be a debt capable of valuation. It might be admitted, for the sake of argument, that the bond was actually forfeited before the fiat, because even then it would not be within section 56, because the commissioner could assess the debt equitably owing, according to Lord *Hardwicke's* judgment in *ex parte Winchester*, 1 *Atk.* 118, where he says, “ Suppose a bond payable by instalments, the obligee gets judgment on the whole penalty, upon a breach of payment at the first instalment ; why even a Court of Law would in such case act equitably, for upon the obligor's applying to the Court there, and offering to pay the money due upon the instalment, and agreeing to let the judgment stand as a security for the rest, they will relieve

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the party on payment of the money then due and costs;" and because section 56 only applies where it was not so forfeited. But, in fact, there was no forfeiture, and till there be, no debt exists which is proveable. *Taylor v. Young*, 3 Barn. & Ald. 521; *ex parte Lancaster Canal Company*, Mont. 17. When the fiat issued there was no "debt" due by the sheriff. The party had only a cause of action against him; there merely existed a possibility of being rendered liable to damages, the amount of which was uncertain and depended on a verdict, where the jury might assess any sum from one farthing upwards.

[Sir John Cross:—That would apply to insurances under section 53.]

That clause is an exception to the general rule in favour of the maritime system of the kingdom. (a) In order to be proveable there must be a debt, or a transaction that must end in a debt, either a sum certain or a positive liability, the amount of which may at once be ascertained, as the value of goods, &c., otherwise there will be no "debt." This doctrine was recognized in *Rose v. Simms*, 1 Barn. & Ad. 526, where Mr. Justice Taunton says, "A mutual credit may be said to exist where there is a debt, or something which will end in a debt; here neither was shown, but only a cause of action, namely, the failure of the defendant to indorse pursuant to his engagement; immediately upon that failure a right of action accrued to the plaintiff, but not a debt; the damages were unliquidated, and their amount dependent upon circumstances." In the present

(a) 9 Geo. 2. c. 32. s. 2. The first enactment concerning bottomry or respondents' bonds recites, that it was passed because their not being proveable might be a great discouragement to trade.

case it was not clear, when the fiat issued, that any liability existed; and assuming there was, yet its amount was uncertain. It would not have been a good petitioning creditor's debt.

[Sir George Rose:—Many debts may be proved which would not support a commission.]

It has frequently been held, that a bond to replace bank-stock generally is proveable only when the bond was forfeited before the bankruptcy. (a) In *Boorman v. Nash*, 9 *Barn. & Cres.* 154, a person had contracted for a certain quantity of oil, to be delivered at a future day, at a certain price, and he became bankrupt before that day; and it was held, that his certificate did not protect him from an action, Lord *Tenterden* saying, "The right of the plaintiff to maintain this action depended upon the question, whether he could or could not have proved his demand under the commission of bankrupt issued against the defendant? It appears to us impossible that he should so prove it, for at the time the commission issued it was uncertain, not only what amount of damage, but whether any damage would be sustained."

Mr. *Twiss* here referred to the cases cited by the commissioners (b), and proceeded as follows:—All these cases support the proposition that there can be no proof on a bond unless there has been a breach of the condition before the issuing of the commission. In the case now before the Court the debt would not have been proveable even if the bond had been so forfeited, because not *primâ facie* capable of valuation at that time. *Ex parte Thompson*, *Mont. & Bli.* 219.

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(a) See the cases on this point collected in 1 *Mont. & Greg. Dig.* 220.

(b) See *ante*, page 118.

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[The CHIEF JUDGE:—I certainly said something to that effect, but it was quite *obiter*; the judgment was on another ground, and I afterwards altered my opinion.]

In *Goddard v. Vanderhayden*, 2 Wills. 262, the Court were of opinion, that if *A.* had a bond of indemnity from *B.*, and the condition be broken, and afterwards *B.* became bankrupt before *A.* had been sued or damaged, though *A.* had a good cause of action against *B.* before the act of bankruptcy, yet as *A.* had not been damaged by paying any certain sum of money by reason of *B.*'s breach of the condition, *A.* could not possibly swear to any debt due and owing from *A.* at the time of the act of bankruptcy.

Mr. *Swanston* in reply:—

In this case there certainly was a valuable consideration for giving up the goods, that is, a bond in a penalty to indemnify the sheriff against all actions and expences. The moment the attorney of the sheriff made any payment in defending the action the bond became forfeited; this was the case before the issuing of the fiat. All the cases which have been cited are either of sureties, where there is no consideration, or cases where the debt was incapable of valuation. When the amount of the debt depends upon unravelling complicated accounts, the amount often cannot be ascertained till long after the issuing of the commission. Still the amount is proveable, when ascertained; and in this case the amount of the debt was at least the value of the goods delivered, which is now ascertained. The amount *prima facie* proveable was here certain, being the penalty of the bond, subject to reduction, if afterwards necessary.

In *ex parte Gundry, Mont. & Mac.* 293, though the contingency happened after the commission, and though

there was no ascertained debt during twenty years, yet the debt was held proveable; and in *ex parte Tindal, Mont. & Mac.* 415, the debt was held proveable, though the contingency could not happen till after the death of the bankrupt.

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The CHIEF JUDGE:—

This is not a point on which much doubt can be entertained. It has been imagined that the decision in this case must shake either *ex parte Myers* (a) or *ex parte Thompson* (b), but it will not necessarily disturb either. In *ex parte Thompson* there was no existing debt when the commission issued, but there was in *ex parte Myers*, *Sudell* being indebted on a bill at the time of the bankruptcy, the payment of which depended on a contingency. In the present case the bond was not forfeited before the fiat issued, and consequently there was no existing debt. All the cases of proof on bonds support the proposition, that, where the bond is not forfeited when the commission issues, there is no debt proveable.

In one of these cases, *Perkins v. Kempland*, 2 *Win. Black.* 1106, it was held, that an annuity bond could not be proved unless it were forfeited before the commission issued, the Court being of opinion, that, if the bond were not so forfeited, there was no debt then due in law, but it was a mere contingency, which might or might not become a debt *in futuro*; but that, where the bond was forfeited, it became a debt at law, and the equitable redemption of that debt, by payment of the arrears and the growing annuity, was the proper subject of valuation, and the debt so appreciated might be

(a) *Mont. & Bl.* 229, S. C.; 2 *Dea. & Ch.* 251.

(b) *Mont. & Bl.* 219.

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proved. In the case now before the Court, the bond not having been forfeited, the circumstance is wanting which would have enabled the Court to act on the equitable principle of considering the penalty as a security for the sum really owing. In order to enable a contingent debt to be proved, it must be such a contingent liability as can be considered a "debt" existing when the commission issues. This is fully borne out by the concluding words of section 56, "provided such person had not, when such debt was contracted, notice of any act of bankruptcy." (a)

It has been argued that the giving up of the goods by the sheriff furnishes a sufficient consideration to enable the petitioner to prove, independently of the bond; but the sheriff's possession of the goods was merely as an officer of justice, he having no power of disposition. If, indeed, he had entered into a contract for their sale, that might raise a new state of circumstances. What *Fox* does is to indemnify the sheriff "from and against all loss, charges, damages, costs, and expences which they or any of them shall or may sustain, suffer, or be put unto for or by reason or means of quitting possession of the said goods, or of returning *nulla bona* to the said writ; and from and against all costs and expences of defending any action or actions which may be commenced against them or either of them on that account;" the meaning of which is, if the goods are not those of the assignees, I undertake to save you harmless from all the consequences of giving them up; it is a mere indemnity, and not such a contract as enables a proof to be made in consideration of the goods.

(a) See *Birè v. Moreau*, 4 Bing. 58; *Clayton v. Gosling*, 5 Barn. & Cres. 360; and *Attwood v. Partridge*, 4 Bing. 209.

The question for judgment therefore is, whether, on this bond, a proof can be tendered after the obligee has been damnified subsequently to the issuing of the commission. This appears to be a short point, it being a principle well recognized in bankruptcy, that the debt must have been incurred previously to the commission. Nevertheless I will look carefully through the authorities, and, if I find any reason to alter my present opinion, I will mention the case again.

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Sir John Cross :—As this is likely to become a leading case, I shall take time to consider my judgment.

Sir George Rose :—

I am anxious to state my opinion immediately, because, after the deliberate judgment of the Subdivision Court, I think it due to the commissioners to state, that in my opinion the question is not of that doubt as to call for delay in giving judgment. Having said this much, I withdraw from all consideration of what passed in the Subdivision Court.

This Court ordered a claim to be entered in the first instance, which was perfectly correct, in order to give time till the relative liabilities of the obligors could be ascertained.

If a bond be forfeited before a commission issues, the Court are enabled to fix upon the penalty, and consider it as a debt, the amount of which is generally governed by the sum equitably due. The language of the 56th section, a “ debt payable upon a contingency which shall not have happened before the issuing of such commission,” is so clear as to preclude controversy concerning its signification. If the petitioner had been a claimant against the assets of a deceased person, the executor would not be justified in considering this a

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debt contracted by his testator during his lifetime ; and if so, it is not, by analogy, proveable under a bankruptcy. The intent of the bond was to protect the sheriff, and not to affect the property in the goods. The parties clearly intended it as an indemnity for an act done, and no court can vary the nature of a contract. There are two kinds of bonds : the first relate to indemnities ; the second to money. The bond here is of the former class, and creates no debt till there has been a breach. I am of opinion that the decisions are correct both in *ex parte Thompson* (a) and *ex parte Myers*. (b) Certainly they are not repugnant to each other : even if so, they both support the order which in all probability will be made in this case. In *Thompson's* case it was held, that on non-payment by the principal, the surety became liable, as a principal debtor, for a debt of his own. When a person is surety only there must be an act done to render him liable through the covenant, which is not the case as to the principal, who is liable on the original transaction. The same class of circumstances and arguments were applicable in the case of the *Lancaster Canal Company*. (c) As to *ex parte Myers*, there never was a doubt but that a debt on a guarantee depending on a contingency was proveable after the contingency had happened. Twenty cases have fallen within my own observation in which commissioners have admitted such proofs as on a species of *assumpsit*, viewing such cases as similar to those which must go to a jury to decide the amount. It is familiar law, that an undertaking to replace bank stock constitutes a liability which enables a proof to be made whenever the amount or value of the liability can be ascertained. It would be my anxious wish to admit this proof, if it could be

(a) *Mont. & Bli.* 219.(b) *Mont. & Bli.* 229.(c) *Mont.* 17

done, because otherwise the bankrupt remains liable, and I consequently was willing to find the bond a mere form, on which the equities to be worked out would attach. If the sheriff conceived he parted with the goods for a consideration, then these equities might attach; but his possession was only as an officer of a court; he could not, nor did he intend to pass or transfer the title to these goods; he could only withdraw from possession, which was that of the party, and for so withdrawing he took an indemnity. It has been asked, how far are the assignees, as against the person through whom they obtained the property, entitled to say that the bond is useless? The answer is, that the bond is still valid for all the purposes for which it was given, that is, for the protection of the sheriff.

The only circumstance for consideration now is, whether this, though an appeal from the commissioners, is not a fair case to allow the petitioners their costs.

Curia advisare vult.

The CHIEF JUDGE stated the facts of the case, and that on the 9th of February 1833 the petitioner applied to prove or enter a claim for 1,000*l.* under the fiat, when his claim was rejected, and a dividend of 5*s.* 6*d.* in the pound was declared. The sheriff thereupon presented a petition to this Court, praying that he might be admitted to prove his claim, and that in the meantime the dividend might be stayed, or funds set apart sufficient to secure his proportion. It appeared that the petitioner was premature in his application for proof, even if his claim had been well founded. The Court, therefore, declined adjudicating upon the merits of the petition, but permitted it to stand over until the damages and costs were paid, and in the meantime ordered a claim to be entered. A fresh petition has been pre-

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sented to this Court, under which the question was, for the first time, properly raised for discussion, whether the loss so incurred by the sheriff after the bankruptcy constituted a debt proveable under the fiat. On the part of the petitioner it was urged, that it was a contingent debt within the meaning of the 56th clause of the 6th Geo. 4. c. 16. On the part of the assignees it was insisted, that, to bring a case within that section, there must be an existing debt at the date of the commission; and that in this case there was no debt until the sheriff was actually damnified by the payment of the money; and the Court was alternately pressed by the case of *ex parte Thompson* (a) and *ex parte Myers*. (b) At the time of the argument of the case, I entertained no doubt of the soundness of the decision of the learned commissioners who rejected the proof, and I stated my opinion to that effect; but as, upon referring to the reports of *ex parte Myers*, it appears to me that I have gone further than the authorities, upon closer examination, will warrant, I wish to avail myself of the reservation of our final judgment on this petition, by pointing out more precisely the view which I take of this question.

In my judgment in *ex parte Myers* I have not sufficiently marked the distinction between contingent liabilities that may never become debts and contingent debts that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class, upon which no debt has arisen till after the bankruptcy, cannot be proved under the 56th section; but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy and before proof is tendered, may be admitted.

(a) *Mont. & Bli.* 219.

(b) *Mont. & Bli.* 229.

The case of *ex parte Thompson* (a) is an example of the first class; the case of *ex parte Myers* (b) was decided as belonging to the second class. In the case of *ex parte Thompson* there was no debt due from any one till after the bankruptcy; in *ex parte Myers* a debt had been clearly contracted with the holders of the bills before the bankruptcy for a specific sum which the bankrupt had engaged to pay, unless he should be released from his obligation, by the drawers taking up the bills. Whether, in deciding that case, we sufficiently adverted to the distinction between guarantees for the repayment of monies actually advanced, or goods sold and delivered to third parties before the bankruptcy, and guarantees for payment of securities current at the time, may perhaps be a fit subject for consideration whenever a similar case may arise. It is enough here to say, no such point arises in this case.

The broad question that presents itself in this petition is, had the bankrupt contracted any debt before the issuing of the fiat against him? In order to answer this question, we must see what had actually taken place before that date. The sheriff had relinquished certain goods which he had seized as *Sewerkrop's*, and had returned that there were no goods of *Sewerkrop's* in his bailiwick. By his own return he is estopped from setting up any claim as upon a sale of the goods seized, and his whole case must rest upon the contract of indemnity as evidenced by the bankrupt's bond. That a mere contract to indemnify creates no debt till a loss has been actually incurred has been too often decided to leave it now a question for argument. The cases of *Young v. Hockley*, 2 Bla. R. 809, *Chilton v. Whiffen*, 3 Wils. 13, *Hoffman v. Fourdrinier*, 5 M. & S. 21, are decisive upon this

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point. Does the circumstance, then, of this contract to indemnify being secured by a bond, make any difference? If the bond had been forfeited before the bankruptcy, and the penalty thereby converted into the nominal debt, the argument would have rested upon a different foundation; for, in that case, though the loss incurred would be the measure of the debt proveable, still it might truly be said that the debt had been contracted before the bankruptcy, although the amount to be paid depended upon an event then resting in contingency; and it was upon the basis of the penalty becoming a legal debt upon the forfeiture of the bond that the Chancellor, sitting in bankruptcy, founded his power, before any specific enactment with respect to annuities was introduced, to admit an annuity creditor to prove, not only for arrears due before the bankruptcy, but for the full value of the annuity.

But the distinction has always been taken between bonds forfeited before the bankruptcy and those forfeited afterwards, a distinction which is strikingly illustrated by the case of *Perkins v. Kempland*, 2 Bla. R. 1106, to which I referred upon a former occasion. In that case, it appeared on motion, that a bond had been given by the defendant to secure the payment of an annuity, which had not been forfeited till after the bankruptcy of the defendant, who had obtained his certificate, and was afterwards sued by the plaintiff on the bond. The Court were of opinion, that, as the bond was not forfeited at the time of the commission, there was no debt then due at law, but it was a mere contingency, which might or might not become a debt *in futuro*. All the cases in Chancery are where the bond is actually forfeited, to redeem which forfeiture it is allowed that a value be set on the annuity; but neither there, or at law, can the debtor be protected from a debt that arises

after the date of the commission. But afterwards it was moved again upon fresh affidavits, by which it appeared, that, though the arrears had been paid up at the time of the commission issuing, the bond had been previously forfeited more than once; and by *De Gray*, and the whole Court, the defendant has made a new case, which is now as clearly for him as the former was against him. The bond, being forfeited, became a debt at law; the equitable redemption of the forfeiture by payment of the arrears, and the growing annuity, was the proper subject of valuation, and the debt so appreciated ought to have been proved under the commission. The same distinction is also clearly explained by Lord *Eldon* in *ex parte Thistlewood*, 19 *Ves.* 245, in which his Lordship says, "that the original cases in bankruptcy considered the penalty of the bond as the debt, not however to be received, but to stand as a security for the annuity." Lord *Hardwicke's* rule originally was, if there were sufficient assets, to pay the annuity half yearly, the debt giving a right to receive under the proof of the annuity itself out of the assets, if the state of the assets permitted, down to the death of the annuitant. The course afterwards changed to setting a value upon the annuity to be proved as a debt, which Lord *Hardwicke* puts upon the convenience of distribution previously to the statute 49 G. 3. If the annuity were secured by a covenant, the arrears only could be proved; if secured by bond and covenant, and there had been no forfeiture, nothing could be proved; but if a failure had occurred, there was this difference between a bond and a covenant, that under a covenant the arrears only could be proved, but under a bond forfeited before the bankruptcy the value of the annuity as well as the arrears; and the clause in the late act of parliament only provides, that, in order to give the annuitant some part of the property, it is no

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longer necessary that there should have been a breach of the condition of the bond.

The statutes that have thus made provision for the proof of annuity bonds, though not forfeited before the bankruptcy, have made no such provision for a bond such as that which forms the subject of the present discussion, and therefore the penalty of this bond, not having been forfeited before the bankruptcy, cannot be considered as a debt existing at the date of the commission; and if the penalty were no debt at that time, there was no debt at all until the money was paid by the sheriff, which was too late to give the sheriff any right of proof.

The petition must therefore be dismissed, according to the provisional judgment of the Court delivered on a former day.

Sir John Cross :—I entirely concur.

Sir George Rose :—I concur. There appears to have been some slight misunderstanding in the court below as to what this Court did in permitting a claim to be entered. An opinion appears to have prevailed, that some discrepancy exists between *ex parte Thompson* (a) and *ex parte Myers*. (b) Those cases are completely reconcilable. The act speaks of a debt payable on a contingency; the first question therefore must be, whether any debt exists? In this case we find none. I have so fully delivered my opinion on a former occasion that I need add nothing more on the present.

Petition dismissed. Without costs, by agreement of the parties.

(a) *Mont. & Bl.* 219.

(b) *Mont. & Bl.* 229.

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C. R.
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EX PARTE John Tiplady, Linen Merchant, and James Barry, Linen Merchant (the assignees chosen by the creditors); Samuel Smith, John Smith, George Smith, Abel Smith, Samuel George Smith, and George Robert Smith, bankers; Lesley Alexander and William Bardgett, linen merchants; William Fickney, black merchant; Thomas Scales, George Scales the younger, and George Scales the younger, warehousemen; Mary Ann Gile, Irish factor; Edward Fletcher, merchant; George Denton and John Wilson, woollen factors; James Justus Deacon, James William Deacon, and Charles Deacon, factors; William Atkinson, dyer; Edward Grainger and Joseph Powell, woollen warehousemen; William Cooper, warehouseman; George Paton, esquire; James Murray and Richard Stacey, linen factors; Anthony Stratton and John Henry Secretan, warehousemen; Thomas Bedford Gummersall, bill broker; Joseph Broomhead Grieves, merchant; William Bailey, porter; John Rogers, hosier; John Spital Miller and George Miller, Scotch factors; John Stutlard, warehouseman; Robert Wilson and William Eyre, factors; John Crocker, gentleman; Thomas Hanson and John Tiplady, factors; George Pears and Edward Hall, bill brokers; Bartholomew Jefferey, merchant; John Merrules, Alexander Pirie, William Reed, Alexander Banneman, and Patrick Pine the younger, merchants; James Spencer and William Spencer, factors; John Scarborough, warehouseman; Henry Wilkinson, warehouseman; John Walkden, and John Walkden the younger, warehousemen; James Tucker and John Tucker, cloth pressers; Richard

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The Court has jurisdiction to revise the allowance made by a commissioner to an official assignee; but, it seems, will only exercise it in extreme cases. In this case interference refused, *Cross, J., dissentiente.*

Ashby, builder; *Richard Ashby* and *John Reddall*, builders; *James Standiwicke*, commission agent; and *Job Wright* and *Thomas Wright*, merchants.—In the matter of *Dickenson*.

This was a petition praying that the amount of the allowance made by the commissioner to an official assignee might be reduced. The petition stated that a fiat issued against *Dickenson* on the 18th of February last, and *Edward Edwards* was appointed official assignee, and the petitioners *Tiplady* and *Barry* were chosen creditors' assignees:

That the debts proved under the fiat by creditors in London did not exceed 21,230*l.*, and the debts proved by the petitioners amounted to 20,879*l.* 16*s.* 3*d.*:

That the trade in which *Dickenson* was engaged previous to and at the time of the bankruptcy was that of a warehouseman and factor:

That at the time of the bankruptcy the property of *Dickenson* consisted of cash and bills in his possession to the amount of 714*l.* 8*s.* 2*d.*; of stock in trade to the amount of 10,567*l.* 7*s.*; of a lease and fixtures of a house in Milk-street worth about 1,500*l.*; of certain mining shares worth about 800*l.*, and sundry debts, considered good, to the amount of 7,015*l.*:

That immediately upon the appointment of *Edwards* as official assignee (on the said 19th of February last) the sum of 714*l.* 8*s.* 2*d.* in cash and bills belonging to the bankrupt's estate, in hand at the time of issuing the fiat, was paid to *Edwards*:

That shortly afterwards the petitioners *Tiplady* and *Barry* sold the bankrupt's stock to two persons for sums amounting together to 10,567*l.* 7*s.*; viz. one part of the stock to Messrs. *Caldecott* and Company for 7,553*l.* 11*s.* 8*d.*, and the residue to Messrs. *Morley* for

3,013*l.* 15*s.* 4*d.*; which sums were paid to *Edwards* by cheques upon London bankers as follow; viz.—

1833, March 23d, <i>Caldecott</i>	-	£5,000	0	0
— — — <i>Morley</i>	-	2,000	0	0
— April 9th, ditto	-	1,013	15	4
— — 10th, <i>Caldecott</i>	-	2,000	0	0
— — 27th, ditto	-	350	0	0
— June 1st, ditto	-	203	11	8

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That *Tiplady* and *Barry* sold the lease and fixtures of the bankrupt's house in Milk-street for 10,415*l.*, which was paid to *Edwards* on the 30th of May last, in one sum, by the purchaser's cheque on Messrs. *Ladbroke* and Co. bankers :

That *Barry* sold the mining shares for 850*l.*, and certain other effects for 16*l.* 19*s.*, and paid the two last-mentioned sums to *Edwards* on the 19th of April last, in one sum, by a cheque on Messrs. *Smith, Payne*, and Company, bankers, for 866*l.* 19*s.* :

That between the 19th of February and the 18th of June last *Edwards* received sundry debts and other sums of money on account of the bankrupt's estate, amounting together to 4,627*l.* 11*s.* 6*d.*, the whole or nearly the whole of which was paid to *Edwards*, or his clerk, at his own office at Pancras Lane :

That the aforesaid sums of money amount altogether to 18,250*l.* 9*s.* 2*d.*, which was all received by *Edwards* before the 18th of June last, and was the whole amount produced in cash up to that time from the property of the bankrupt.

That, out of the sum of 850*l.* paid for the mining shares, *Edwards* paid 574*l.* 0*s.* 4*d.* for which the shares were pledged by the bankrupt before his bankruptcy, but that *Edwards* charged a commission to the bankrupt's estate upon the whole of the 850*l.* :

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That such of the book debts due to the bankrupt as required any trouble and exertion in the collection were outstanding, and not received by *Edwards* up to the 18th of June last :

That for his trouble up to the 18th of June last, when a dividend was declared, *Edwards* charged the sum of 488*l.* 17*s.* 2*d.* :

That the particulars of such charge were as follow ; viz.

Examining books and accounts	-	-	£10	10	0
On collection of debts under 100 <i>l.</i> , five per cent. on 4,412 <i>l.</i> 5 <i>s.</i> 3 <i>d.</i> received in cash	220	12	2		
Ditto, do. above 100 <i>l.</i> and not exceeding 500 <i>l.</i> , 2½ per cent. on 337 <i>l.</i> 19 <i>s.</i> 9 <i>d.</i>	8	9	0		
Ditto, do. other debts, one per cent. on first 1,000 <i>l.</i>	-	-	10	10	0
Half per cent. above, on 12,500 <i>l.</i> 3 <i>s.</i> 2 <i>d.</i>	62	10	0		
On money divided, two per cent. on first 1,000 <i>l.</i>	-	-	20	0	0
One per cent. above, on 14,914 <i>l.</i> 10 <i>s.</i> 7 <i>d.</i>	149	3	0		
On number of creditors who proved, 1 <i>s.</i> each, 153	-	-	7	13	0
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That exclusively of the sum of 488*l.* 17*s.* 2*d.* there was paid out of the estate to Messrs. *Parrinton* and company, auctioneers and accountants, for their services relating to the stock and the disposal thereof, the sum of 98*l.* 10*s.* 3*d.*, and that the sum of 488*l.* 17*s.* 2*d.* was exclusive of the 99*l.* 7*s.* 10*d.* paid out of the estate for fees and compensation fund up to the 18th of June last, and of 10*l.* 7*s.* 6*d.* for petty charges :

That to such sum of 488*l.* 17*s.* 2*d.* the petitioners *Tiplady* and *Barry* objected to the commissioner :

That notwithstanding such objection the commissioner was pleased to allow *Edwards* the whole of the sum of 488*l.* 17*s.* 2*d.*

The petition prayed that the sum of 488*l.* 17*s.* 2*d.* might not be allowed to *Edwards*, but that such sum might be allowed as to the Court might seem proper, and that the costs of and incidental to the application might be paid out of the estate.

In reply to this petition the official assignee made the following affidavit :—

That at the issuing of the fiat there were 403 parties or firms (or thereabouts) indebted to the estate of the bankrupt in various sums, of which 345, or thereabouts, paid the amounts on or before the 18th of January, in consequence of the great exertions used by deponent to collect and get in the debts :

That 101 paid upon or after the first application ; 150 upon or after the second ; 53 upon or after the third ; 35 upon or after the fourth ; and 6 upon or after the fifth application :

That with the view of collecting as much as possible before the 18th of January, being the day appointed for a first dividend, he made special applications, in many instances alluding expressly to the day appointed for the dividend, and particularly requesting payment in order that the amount applied for might be included in the amount to be divided :

That had it not been for the great exertions which he so used, and by which he succeeded in obtaining payment from the 345 debtors, or thereabouts, a comparatively small number and amount of the debts would have been collected previous to the dividend meeting :

That, in addition to the applications to the debtors which were successful, he had applied to 58 other par-

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ties or firms, or thereabouts, in a similar manner, on or before the 18th day of June, but without success :

That in addition to the collection of the debts, and the getting in of the property of the estate, there were various other duties of an extensive nature which devolved upon deponent, arising from or connected with the proper administration of the bankrupt's estate ; as, for instance, examination of the bankrupt's books and accounts, and also the examination of his balance sheet ; the examination and adjustment of the creditors' accounts previously to the proof of their debts, and subsequently on payment of their dividends ; the making proper inquiries and taking proper steps with a view to the expunging and reducing of proofs, where he discovered or had reason to believe that the creditors have received monies from other sources connected with the bills and securities exhibited, or that for any other reason the proof made is greater than it ought to have been ; also, the examination and payment of all claims for wages, allowance to the bankrupt, rents, taxes, rates, insurance upon property belonging to the estate, carriage of goods, and all other charges incidental to the working of the estate :

That the items specified in the affidavit of *Tiplady* as composing or forming the sum of 488*l.* 17*s.* 2*d.* were fixed and calculated by the commissioner himself, and by his direction copied in the margin of the accounts of the assignees previously to the accounts being sworn to, and passed by the commissioner ; that such allowance was made by the commissioner after frequent meetings had been held by the commissioners of the Court of Bankruptcy, to consider and determine the principle and views by which they should exercise their discretion in making allowances to official assignees, having regard

to the nature of the duties to be performed by such official assignees, and to the amount of the respective estates to be administered :

That out of such allowance as aforesaid deponent has to pay the rent of his offices, clerks' salaries, and all other charges connected with the establishment of an office where extensive business is conducted :

That on the 19th of April last he paid 574*l.* 14*s.* 4*d.*, by a cheque on his private bankers, to redeem certain mining shares which had been pledged, and on the same day received 850*l.*, being the produce of a sale of such shares :

That the mode adopted for redeeming such last-mentioned property was highly advantageous to the estate, in having rendered an application to this Court unnecessary on the part of the equitable mortgagee for an order of sale, and all subsequent proceedings consequent on such order, whereby great expence was saved to the estate :

That he has been informed and believes that previously to the issuing of the fiat the bankrupt offered a composition of 7*s.* 6*d.* in the pound in full satisfaction of the debts owing by him, and there has already been paid to the creditors who have proved a dividend of 9*s.* in the pound.

The following affidavit was made by *Peter Harris Abbott* and *James Foster Groome*, two of the official assignees :—

That prior to their appointment as official assignees they had been for many years almost exclusively employed as public accountants, and had extensive employment and experience in the collection of debts due to bankrupts' estates, and the examination of bankrupts' accounts, and other business necessarily attending the winding up of bankrupts' affairs :

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That they were generally allowed by the commissioners acting before the formation of the present Bankruptcy Court any rate of commission for the collection of debts satisfactory and agreed to by the assignees who employed them, varying according to the amount and character of the debts collected, besides an extra sum, which constituted the principal profit of the accountant, for time occupied by their clerks and themselves in the examination and preparation of the bankrupt's accounts, and other accounts and transactions relating to his estate, as also for their attendance upon the commissioners, assignees, solicitors, debtors and creditors of the bankrupt estate, and for the examination, adjustment, or payment of the various demands thereupon, and for other general business which arose in the working of the bankrupt's estate :

That if the estate of the bankrupt had been administered in the manner adopted before the establishment of the present Court of Bankruptcy, and either of deponents had been employed as accountants to collect the debts, and to conduct the general business, they should have expected a commission of 5*l.* per cent. for the collection of the debts alone, independent of their charges for all other business to which their time and attention would necessarily have been required ; and that they verily believe, from their experience in bankruptcy proceedings, that such charges would have exceeded 488*l.* 17*s.* 2*d.*, the sum awarded to the official assignee under this estate :

That from such experience, both before and since the foundation of the present Bankruptcy Court, the assets of the bankrupt could not have been got in under the old system, either as respects the proportional amount of assets realized, or as respects the time, within which the same has been gotten in.

In answer to the foregoing affidavits, *John Tiplady*, the creditors' assignee, deposed that he applied to *Mr. Parrinton* and also to *Mr. Threlheld*, of Woodstreet, Cheapside, accountants, and inquired the particulars of their charges in managing and winding up of bankrupts' estates; and was informed by each of them, that if he had been employed in winding up the bankrupt's affairs, and had been left to make his own charge for so doing, by way of per-centage on the amount of book debts received, he would have considered that a commission of two and a half per cent. on the amount received for the book debts, in addition to three quarters per cent. which *Mr. Parrinton* charged for the arrangement and sale of stock, would have been a full and fair remuneration for all the business to which his time and attention would necessarily have been required, so far as he could form an opinion, including the examination of the bankrupt's books and accounts, and also the examination of his balance sheet, examination and adjustment of the creditors' claims previously to the proof of their debts, and subsequently, on payment of their dividends, the making proper inquiries and taking proper steps with a view to the expunging and reducing of proofs, where, from information obtained, it should be discovered or there should be reason to believe that the creditors had received monies from other sources connected with the bills and securities exhibited, or that, from any other reason, the proof made was greater than it ought to have been; also the examination and payment of all claims for wages, allowance to the bankrupt, rent, taxes, rates, insurance upon property belonging to the estate, carriage of goods, and all other charges incidental to the working of the estate; and that he had never received so much as 488*l.* under any

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one bankruptcy or insolvency. And Mr. *Threlkeld* further informed this deponent he had the management and winding up of the bankruptcy of Messrs. *Wilson* and *Lilliman*, warehousemen, under which he collected debts to the amount of 10,000*l.* and upwards, and sold stock to the amount of 8,000*l.* and upwards, with the assistance of one of the said bankrupts, in small parcels, and that up to the first dividend the sum of 19,000*l.* and upwards was divided among the creditors; and that for all Mr. *Threlkeld's* services he charged 1*l.* per cent. and no more on the produce of the stock and debts, which commission amounted to 193*l.* 15*s.* 10*d.*; and the assignees and creditors, in consideration of his extraordinary exertions, gave him a further sum of 52*l.* 10*s.*, making together 246*l.*; and that, at the second dividend, a sum of 3,000*l.* and upwards was divided among the creditors, and his further charge amounted to 39*l.* 1*s.* 6*d.* and no more.

The deponent then went on to state, that to the best of his judgment and belief Mr. *Parrinton* and Mr. *Threlkeld* were two of the persons who have been for many years most extensively engaged in the business of public accountants, so far as relates to the disposal of the property, collecting in the debts, and generally in the management and winding up of the estates of bankrupts and insolvents in the line of business carried on by *Dickenson*; and that it was he, and not the official assignee, who arranged for the redemption and sale of the mining shares; and that he got from *Edwards* his cheque for 574*l.* 0*s.* 4*d.*, which was immediately paid by deponent to the mortgagees of such shares, and within an hour afterwards he paid to *Edwards*, in his own office, the sum of 850*l.*, for which he (deponent) sold the shares.

That at the time *Edwards* signed the cheque for 574*l.* 0*s.* 4*d.* he had money in his hands to that amount belonging to the estate, as deponent verily believed, and as appeared to deponent by the accounts of *Edwards*.

The following affidavit was made by *John Sinkins*, in answer to that of the official assignee :—

That he was for several years clerk to *Dickenson*, and for some time his partner ; that, upon failure of *Dickenson*, deponent made up the books and accounts of *Dickenson*, and also his balance sheet, and examined and adjusted all the creditors' accounts ; and, previously to the first meeting for proof of debts under the commission, deponent formed a separate book containing the particulars and amount of said debts, and attended with the official assignee at the meeting, at which meeting such book was referred to by the official assignee and deponent, as a check upon the amount of the debts which the creditors attended to prove ; and that he was paid by the assignees the sum of 15*l.* for his services.

After the petition had been presented, and with a knowledge of that fact, the Commissioner made the following certificate :—

In the matter of *William Dickenson*, a bankrupt :—

I hereby certify, that under and by virtue of the judicial discretion vested in me by the act of parliament in that behalf, I ordered to be paid out of the bankrupt's estate, to the official assignee thereof, the sum of 488*l.* 17*s.* 2*d.* as a remuneration for his services, such sum of money appearing to me, upon consideration of the bankrupt's property, and the nature of the duties of the official assignee, to be just and reasonable.

EDWARD HOLROYD.

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Mr. *Twiss* and Mr. *Montagu* for the petitioners: —

The decision of the Court in this question is expected with great anxiety by the mercantile world, to whom it is one of the first importance; and if the present allowance be permitted to stand, the circumstance will operate as a considerable drawback upon the efficient working of the system recently introduced.

The questions are, 1st, whether this Court has jurisdiction to review and reduce the allowance made by the commissioner; and, 2d, whether, if it has, this is a case calling for interference.

1st, As to the jurisdiction. The 22d section of 1 & 2 W. 4. c. 56, enacts, that the official assignees are to “give such security, to be subject to such rules, to be selected for such estate, and to act in such manner as the said chief and other judges, with the consent of the Lord Chancellor, shall from time to time direct.” Section 57 of the same statute enacts, “that it shall be lawful for the commissioner before whom any person shall be adjudged a bankrupt in the said court of bankruptcy, or who shall appoint an official assignee under the power herein-before given for that purpose, to order and allow to be paid out of the bankrupt’s estate, to the official assignee thereof, as a remuneration for his services, such sum of money as shall appear to such commissioner, upon consideration of the amount of the bankrupt’s property, and the nature of the duties to be performed by such official assignee, to be just and reasonable.”

By the 27th of the general orders of this Court, issued the 12th of January 1832, the power given by the 22d section was exercised as follows: “That it is recommended to the commissioners to allow the official assignees one per cent. on the monies they respectively receive, and one and a half more on the monies actually

to be divided, subject nevertheless to be increased or diminished in any case under special circumstances, to be referred to the Court of Review." And the 25th order is, " That each official assignee shall follow the instructions of the commissioner under whom he acts, according to the exigencies of each particular case, subject to such directions as shall, from time to time, be prescribed by the Court of Review." All which clearly proves the power of the Court to interfere. In *ex parte Ellis, Mont. & Bli.* 116, the appointment of an official assignee was objected to on the ground that he would receive 300*l.*, though he would have nothing to do; but the Court said, " it is a mistake to suppose that if he has nothing to do he will receive 300*l.*"

But, independently of *ex parte Ellis*, the jurisdiction is clear. Thus, in *ex parte Candy, Mont. & Mac.* 197, where the question was, whether the rejection by the commissioners of a person, as unfit to be an assignee, was subject to appeal, the Vice-Chancellor said, " Upon the question, whether the Court has jurisdiction to interfere, I entertain no doubt whatever, because I apprehend that it is inherent in the jurisdiction of the great seal to superintend the acts of every person connected with the commission, except where the legislature has otherwise directed. The jurisdiction to remove assignees prior to the late act was always exercised without there being any express authority given by statute, because it was considered to be inherent in the jurisdiction of the great seal." In *ex parte Anthony, 2 Gl. & J.* 177, it was held, that the Court had jurisdiction to review the amount allowed by the commissioners to the assignees, and was not confined to the principle on which the allowance was made.

2d, Is this a case calling for interference?

The 57th section, before referred to, authorizes the

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commissioner to make the allowance, upon consideration of the amount of the property and of the nature of the duties to be performed; but it is clear, that in the present instance the commissioner could not have proceeded to consider the particular circumstances of this bankruptcy, but must have proceeded upon some general rule, which not being a sufficient compliance with the exigencies of the act, the Court will have the less hesitation in interfering to reduce an allowance so made.

This official assignee has received 488*l.* for merely receiving payment of a few checks. In addition to the 488*l.* a sum of 99*l.* has already been disbursed for fees, nearly double what would have been payable under the old system, and 98*l.* for auctioneers' charges. The number of days which this official assignee was engaged was about 122, consequently he was paid four pounds a day; and for what? for receiving money!

The question then is, Will this Court interfere to arrest the evil of this great expenditure of the monies of bankrupt estates? An expenditure which has already driven the creditors of insolvent traders to endeavour to settle by trust deeds, which are neither so open or equitable a means of distributing an estate as a fiat in bankruptcy.

Sir *George Rose*:—I think the certificate of the commissioner is conclusive against the petitioners. I have no doubt of our having jurisdiction. This Court has a general jurisdiction over the commissioners, although there are many particular instances where it has none, such as the adjudication, adjournments *sine die*, commitments, the certificate, &c., in all which instances they act without being under our control. In this case, however, the payment being made out of the estate, throws upon us the duty of exercising control over the commissioner, if the circumstances of the case demand

it. But it would be both delicate and difficult for the judges of this Court to appreciate the value of the services of the official assignee. The circumstance that the commissioner drew up his certificate after his attention had been drawn to the facts of the case, and that a petition was presented, appears to me so strong, that I do not see how we can, after that, act as a jury to assess a *quantum meruit*.

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The CHIEF JUDGE:—The question as to jurisdiction is so important, that I am not prepared to say that I have yet made up my mind. I wish to hear the case fully argued.

Sir John Cross:—I shall not, at this stage of the case, express any opinion. The probability, however, is, that as one commissioner has power to make the allowance, it will be found that this Court, consisting of three judges, has power to review it.

Mr. Blackburn and Mr. Russell for the official assignee:—

Jan. 24.

The defence of the official assignee rests upon three propositions, either of which alone would entitle him to have this petition dismissed.

1. The Court has no jurisdiction. The whole power as to making the allowance is vested in the commissioner, and uncontrollable.

2. If the Court should be of opinion they can interfere, yet as the discretion vested in the inferior jurisdiction has been *bond fide* exercised, the Court will not interfere; the rule on such occasions being, that the Court above interposes only when the power is not exercised at all, or exercised *mala fide*, which latter is considered as no exercise.

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3. If the Court should be of opinion that there is not enough in the first or second proposition, then the Court will not interfere on the merits.

1st, The 22d section of the 1 & 2 W. 4. defines the power of this Court over the assignee, which is upon rules made with consent of the Lord Chancellor. The words of the 57th section of the same act clearly vest the whole discretionary power in the commissioner, only subject to control by any general order of the Court ; and it is reasonable such should be the case, because all the acts of the official assignee are immediately under the daily inspection of the commissioner, who consequently can form the most correct opinion as to the proper amount of his remuneration.

It is an act within the observation of Lord *Eldon*, *ex parte King*, 11 *Ves.* 425: " There are many acts of the commissioners that the great seal cannot control ; the commissioners having the authority to do them given by the legislature." The sum is to be fixed by the commissioner. Suppose the Court direct him to allow a less amount, and he were to reply that he could not consistently with his knowledge of the circumstances of the case, there would then arise a collision, and how could the point be set at rest? If there be any one question peculiarly proper for the commissioner's decision, it is this allowance, the amount of which depends on a multitude of minute circumstances, to bring which in review before the Court would consume vast time, and cause more expence than the value of any excess of allowance can amount to.

It therefore appears, that this Court has no jurisdiction to review the allowance made by the commissioner.

2d, Whenever magistrates or masters in Chancery have performed even ministerial acts the court above will not interfere if the power were *bond fide* exercised.

The Court of King's Bench has a general power of superintendence over the acts of all inferior magistrates, as this Court has over the commissioners, but where the act or duty of the magistrate is one which is to be guided by discretion, which appears to have been duly exercised, the King's Bench never interferes, unless some point of law be involved; and this view the Court appear to have taken in *ex parte Ellis*. There the commissioner thought he had no discretionary power; but this Court informed him that he was mistaken in point of law, and that he had such discretion.

In *The King v. The Mayor and Aldermen of London*, 3 Barn. & Ald. 255, where most of the other cases on the subject are referred to, it was decided, that, where the fitness of a person to be admitted alderman was to be determined by the discretion of the lord mayor and aldermen, the Court could not interfere. In that case Lord Tenterden says, "If a matter is left to the discretion of any individual or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient for him, in common sense, to say that he has exercised that power according to the best of his judgment." Now the 57th section authorizes the commissioner to order to be paid to the official assignee, as a remuneration for his services, such sum of money "as shall appear to such commissioner, upon consideration of the amount of the bankrupt's property, and the nature of the duties to be performed by such official assignee, to be just and reasonable." By these words the allowance is precisely as much in the discretion of the commissioner as the admission of an alderman is in the

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discretion of the mayor and aldermen; and that he has exercised his discretion is clear from the words of the certificate. If the Court could interfere in the present case to review the allowance, it would become necessary for assignees, in order to their protection, to keep a journal, and enter every minute act with more care than a solicitor drawing up a bill of costs; then, indeed, they would have enough to do; the trouble of noting down what was done would be more onerous than the duties themselves. An official assignee has all the duties of other assignees to perform; he must investigate all claims against the estate, and must ascertain the amount of the estate itself, &c. &c. As to letters, not only must they be sent, but it must be arranged to whom. It has been said, that the expence of working a fiat is greater than formerly of a commission; such is not the case. It has been ascertained that of the bankruptcies prosecuted before Mr. Commissioner *Evans*, the expences, upon the whole, have not been half what they would have been under the old system.

Mr. *Twiss* in reply:—

If the arguments of the other side prevail, in future commissioners may allow any sum, without the possibility of the creditors procuring redress, however large the sum, and small the estate. As to the jurisdiction—

[The CHIEF JUDGE:—There is no doubt with any of the Court that we have jurisdiction; the question is as to the propriety of interfering on the present occasion.]

As to the certificate, it does not appear from its wording that the commissioner made this allowance after an actual inquiry into and consideration of the circumstances of this particular case. He apparently acted on some general rule. The certificate might be

printed as a common form applicable to all cases. It follows the words of the 57th section to a particular point, "upon consideration of the amount of the bankrupt's property, and the nature of the duties;" but here it stops, and omits the words "to be performed," and does not refer to the duties performed and to be performed in this particular case. It therefore appears that the commissioner, acting on some general rule, gave a per-centage to be allowed in all cases, thus making good estates pay for bad ones, the rich suitor for the poor suitor:—a very convenient doctrine. This is further proved by the affidavit of the official assignee himself, who states the general nature of his duties, not those performed under this particular bankruptcy; but the legislature clearly intended the remuneration of the official assignee to depend upon his labour in each particular instance. It has been argued, that the commissioner is most fit to decide the amount, because the official assignee is under his daily review. It is on this account that this Court should interfere. This familiarity with the commissioner, the means which he has of getting round him, is precisely the reason why the commissioner is the worst, while this Court, being removed from all such influences, is the most proper tribunal to decide the question. Indeed, the interference of this Court would relieve the commissioner from a very painful situation.

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The CHIEF JUDGE:—

This being a question of so much general importance, I thought it right that it should receive the fullest discussion; and I think it right to pause before making the final order, in case I should discover reason to change the opinion I at present entertain. I will however now deliver my present opinion, in order to obviate the

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necessity of the attendance of the parties again, if I should not change.

This is a petition by persons whose names alone would give it importance. This removes all doubt as to its being presented *bond fide*, and for the purpose of settling the principle as to the allowance to official assignees. Whether or not the official assignees constitute a beneficial portion of the new system is not a question which a court can entertain, or upon which its judges are called on to deliver any opinion. After they have been tried, if any thing be discovered to be defective or bad, doubtless the legislature will interfere to supply the deficiency or rectify the error.

First, as to our jurisdiction to interfere. The order of the commissioner now complained of is under the authority of the 57th section; and it is argued that the words thereof, "as shall appear to such commissioner, &c., to be just and reasonable," deprives this Court of any jurisdiction to interfere with the discretionary power thereby given. But the case of *ex parte Candy, Mont. & Mac.* 197, is conclusive against that argument; for the words of the 61st section of 6 Geo. 4. c. 16. are quite as strong in favour of the exclusive jurisdiction of the commissioner as those of the 57th section of 1 & 2 W. 4. In *ex parte Candy* it was argued, as it was in this case, that the discretion of the commissioner was absolute; but the Vice-Chancellor entertained no doubt whatever as to his power to interfere; and his Honor's words, "I apprehend that it is inherent in the jurisdiction of the Great Seal to superintend the acts of every person connected with the commission," very closely correspond in spirit with those of the 2d section of the Bankrupt Court Act, which enacts that the Court "shall have superintendence and controul in all matters of bankruptcy, and also shall have power, jurisdiction,

and authority to hear and determine and allow all such matters in bankruptcy as now usually are or lawfully may be brought by petition or otherwise before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy or elsewhere, except as is herein otherwise provided." Has the legislature "otherwise provided" as to the decision of the commissioner concerning the allowance to the official assignee? It has not. Whereas, with reference to the rejection of proof of debts, which by the terms of the 2d section could be appealed against generally, that appeal by sections 30 and 31 is expressly confined to matters of law and equity, and the refusal or admission of evidence. It is clear, therefore, that there is nothing in the language of the 57th clause depriving the Court of jurisdiction. Indeed, if we were to rule that we had no jurisdiction in the present case, the principle of that decision would necessarily deprive us of power over almost every act of the commissioners.

Second, as to the propriety of interference in this case. I am of opinion that it is the duty of the Court to guide its discretion by an analogy to the rules which govern the King's Bench in exercising jurisdiction over the acts of magistrates. I think this Court ought not to interfere in the present instance. The reason of my declining to interfere is not any apprehension that so doing would appear to inculcate or exhibit any want of delicacy towards the judgment of the commissioner; if one of the judges of this Court had been sitting as commissioner, under section 21, the Court of Review would, if necessary, reverse his decision. The ground of my judgment is the peculiar nature of the discretion vested in the commissioner. By the terms of the act official assignees are immediately under the eye of the

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commissioner during the whole course of their duties: he accurately knows, not only what duties they have performed, but can anticipate those which they will hereafter be called on to discharge. The 57th section speaks of the nature of the duties to be performed; so that the amount of remuneration must necessarily be fixed before all the duties are fulfilled, and some most onerous ones must remain to be subsequently performed. It is, therefore, properly left to the commissioner to decide the amount. If it had been shewn that the commissioner, in making or calculating the amount of allowance, had acted on circumstances which were bad in point of principle, for instance, that the rich estates should pay for the poor ones, such would have been an erroneous principle, which this Court would have been called on to set right. But I cannot presume that the commissioner so acted; for though it is suggested at the bar that such might have been the case, yet that suggestion is unsupported by affidavit. I therefore assume the contrary to be the fact, which I am enabled to do the more readily, being supported by the language of the certificate. Much has been said as to the time occupied in the discharge of these duties, as compared with the amount of remuneration. It should be remembered that the official assignee has duties which may extend over many years, for which he can receive no further remuneration; consequently, unless there were either gross neglect, gross want of proper principle, or gross inaccuracy, I would not interfere. The difficulty of examining what duties have been performed has been urged as an objection to our interference. I would not be swayed by any consideration as to the amount of trouble: if it were our duty to interfere, that duty must be discharged, however irksome or laborious.

On the whole, I think that the decision of the commissioner in this case is not one with which the Court is called on to interfere.

Sir John Cross :—

This is a case of so much importance that I shall deliver no opinion as to whether or not we ought to interfere till I have carefully perused the affidavits, with a view to ascertain, if possible, whether the commissioner made the allowance in question in pursuance of some general rule, or upon a consideration of the peculiar circumstances of this particular case.

But as to the question of jurisdiction, I am surprised that it has been raised. If we look for statutory jurisdiction, we find scarcely any before the new act. The 6 Geo. 4. c. 16. s. 14. authorizes the commissioners to tax the solicitor's bill of costs, and says nothing about any appeal, which, nevertheless, always existed. Till the late act the Court had no power by statute to remove assignees, yet always exercised that power. Under the 6 Geo. 4. c. 16. s. 106. the commissioners are to allow the assignees to retain all such money as they shall have expended in suing out and prosecuting such commission, and all other "just allowances;" then the 1 & 2 W. 4. c. 56. creates official assignees, and entitles them to a remuneration. The question here is, how much an (official) assignee is entitled to for his personal services. Is this not a matter of "just allowance" proper to be entertained in this Court?

Sir George Rose :—

I concur in thinking that this petition is presented with the *bond fide* intention of setting an important question at rest; if such were not the case, it would be difficult to avoid making the petitioners pay the costs.

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I think we have jurisdiction in this case. The commissioners on many occasions act quite independently of the controul of this Court, for instance in signing the certificate; but this is a question affecting the bankrupt's estate, which the preamble of the 1 & 2 W. 4. c. 56. makes the foundation of our jurisdiction: "Whereas it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise touching the same." It may be laid down, therefore, as a general rule, that whatever is an incident in the distribution and management of a bankrupt's estate is under the jurisdiction and controul of this Court.

But on what principle are we to interfere in this case? Unless the allowance be manifestly so much too great, that, to use the common expression, a man must hold up his hands and exclaim against it, (as is necessary in questions of value, both in equity and under the civil law), the Court ought not to interpose where the discretion is vested elsewhere.

It cannot have escaped notice that the general power of this Court on appeal has been in some instances cut down by particular sections of the new act. As to the appeal under the 14th section of the 6 Geo. 4. c. 16. the concluding words of that clause expressly give it. As to appeals relating to proofs, this Court could hear them without the power conferred by the new act; yet in section 31 it is expressly given; so that it might be argued, that if the legislature had intended we should have power to review the allowance under section 57 of 1 & 2 W. 4. c. 56. it would have expressly given the appeal, as it has in section 31. If the Court were without the certificate of the commissioner, some doubts might arise in my mind as to what course should be pursued; if I thought that the commissioner did not intend

to certify that he had fully satisfied the terms of the 57th section, I should probably think it right to send the matter back to him. But I am of opinion that the commissioner intended so to do; indeed, when I consider the circumstances under which the certificate was drawn up, its words, and its heading, "In the matter of *Dickenson*," I can come to no conclusion except that he intended to state that this allowance was made on consideration of the circumstances of this particular case, and this only. Suppose there had been no certificate, and we had sent the case back to the commissioner, and he had returned it with this certificate, how could we act? I, for one, should disclaim any authority to interfere by referring it to any other commissioner, or to one of the registrars; it would then fall upon us to decide; and I should feel very reluctant to take upon myself to decide the *quantum meruit*. Suppose we order an issue; how is it to be drawn, or how is the judge to leave the point to the jury? So far as the official assignee is personally concerned in this matter, it appears to me, that having his allowance fixed by the commissioner is one of the terms of his contract with the public.

The question, however, comes to this, whether the sum allowed is a proper remuneration. The sum may or may not be too much; I do not say whether it is or not; but I say I do not know how to decide that question; consequently, after the original judgment of Mr. *Holroyd*, a commissioner of unsuspected integrity and admitted ability, confirmed by his subsequent certificate, I think this Court ought not to interfere.

Sir John Cross :—

I hope it will be clearly understood that I do not for a moment intend to insinuate any improper motives to the commissioner. My observations amount to this:

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—
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and others.
In the matter
of
DICKENSON.

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 TIPLADY
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 of
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having heard the affidavits read, I entertained some doubt whether the commissioner made the allowance on a general rule or scale, or after a consideration of the special circumstances of this particular case. The certificate does not in direct terms state how the fact is, but is so drawn as to leave that in doubt; and, after following the words of the clause, stops short, and omits these words which would cover the special circumstances of this case. If the allowance was made with reference to some general rule it was made on a bad principle.

Sir *John Cross* declined delivering his opinion till he had carefully read all the affidavits.

Jan. 31.

Sir *John Cross* : —

This is a petition presented by all the assignees except the official assignee, and between thirty and forty creditors, complaining of the amount of the allowance made by the commissioners to the official assignee, and praying the Court to review that allowance. The opinion of my learned colleagues is, that the Court ought not to interfere. I regret to say that I am unable, after great reflection, to concur in that opinion. I have an impression that petitions are got rid of here more frequently than I could wish, either because we have no jurisdiction, or because it is said “we had better not interfere.” In so doing we but follow the example of the judges of the Court of Chancery, who gladly availed themselves of expedients for getting rid of a portion of the burthen of business. This Court was erected expressly to relieve Chancery of a portion of that burthen; it is therefore not right to be captious as to jurisdiction. Under these impressions I have considered this case. I have considered *ex parte Anthony*, 2 Gl. & J. 55, which is almost precisely similar. The commissioners

had allowed a certain sum to the assignees for expences, which they complained was not sufficient, and petitioned. The Vice-Chancellor said, " This appeal from the commissioners, not in respect of any wrong principle of taxation, but of their judgment in the amount to be allowed, cannot be entertained by this Court. They are the competent jurisdiction for settling the accounts of the assignees; and I cannot enter into the consideration of the *quantum* of the allowance made by the commissioners, but only of the principle upon which they have proceeded." And this doctrine of the Vice Chancellor was adopted and acted on by my learned colleagues. I cannot concur with them; and in support of my objections to the doctrine of non-interference, I have the high authority of Lord *Eldon*, who concurs with me, for the assignees appealed to his Lordship, who said, " Such, I confess, is a new doctrine to me, and not consistent with what, in my apprehension, is the jurisdiction of the Court." And his Lordship overruled the decision of the Vice-Chancellor, and went into the case. *Ex parte Anthony*, 2 Gl. & J. 177.

My opinion, following that of Lord *Eldon*, is, that this Court ought to review the amount of the allowance, but this my learned colleagues decline to do. Two questions arise upon this petition: first, whether the Court will entertain the petition, and review the allowance; and, second, whether, having reviewed it, the Court would adopt it or not. Whether the Court ought to review the allowance, and whether, having reviewed it, ought to reduce it, are two perfectly distinct questions.

My opinion is, that the Court ought to have reviewed the allowance; which opinion is founded on the following considerations:

1st. The magnitude of the amount allowed.

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TIPLADY
and others.
In the matter
of
DICKENSON.

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2d. All the assignees (except the official), and the whole body of London creditors (which includes nearly all the creditors) concur in the petition.

3d. The allowance appears to have been made without due regard to the rules laid down by this Court.

4th. The allowance appears to have been made according to a general scale, not regarding the special circumstances of this case.

5th. That the course pursued by the commissioner, in making this allowance, did not require his active interference, which the words of section 57 imply to be necessary. If made by a scale, any one might have made it.

6th. Because in this case there are special circumstances which ought to have influenced the calculation.

7th. Being the first case which has occurred upon the point, to have entertained it would have enabled the Court to express its opinion as to the way in which it worked, and if necessary to have revised or modified the general rule.

As to the general rule, it was, when made, considered as probationary. No doubt the commissioners have laid down an excellent general rule; and the probability is, that, even in the present case, the allowance made would have been confirmed by the Court, if the matter had been considered. Concerning the official assignee under the fiat, Mr. *Edwards*, I am happy to find that there are no complaints made against him, but that he is admitted, on all sides, to have discharged his duty with skill and diligence. I am also glad to hear all persons who are interested in quickly getting paid their dividends under bankrupt estates speak in high terms of the principle of the appointment of official assignees: those who do find fault are not practically concerned. The official

assignee here states that he never interfered or stated any circumstances to the commissioner concerning the amount of the allowance; and there exist very peculiar circumstances in this case, which were not likely to become known to the commissioner, unless his attention was specially drawn to them. These are, that before the bankruptcy all the bankrupt's affairs were wound up and settled by the creditors; a balance sheet prepared; an inventory of the effects made; the goods sold; and then, when the fiat issued, this produce was handed over to the official assignee in cash and cheques. These special circumstances make the petitioners desirous that the allowance should be reviewed: reduced if excessive; confirmed if right. Which of these we should have done I do not say, but I think a review would have been more satisfactory to all parties; but as my learned colleagues are of a different opinion, this petition must be dismissed.

1834.

Ex parte
TIFLADY
and others.
In the matter
of
DICKENSON.

Ex parte LOW.—In the matter of HOBSON.

THIS was an appeal, upon special case, from the Court of Review.

Mr. *Pepys* and Mr. *Whitmarsh* for the appellant stated, that the judge, in settling the special case, had omitted to state a fact material to the appellant's case, viz. that a certain book was produced and used as evidence upon the hearing in the Court of Review.

[LORD CHANCELLOR:—If the judge, in settling the special case, rejected any statement which ought not to have been struck out, or admitted any matter which ought to have been rejected, an application should have been made to rectify the error before the appeal was set down.]

L. C.

Aug. 15,
1833.

On an appeal from the Court of Review, on a special case, the Chancellor will not at the hearing permit the appellant to present a petition for liberty to proceed "otherwise," for the purpose of rectifying an error in the settlement of the special case. The determination of the judge is final as to the settlement of it.

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Ex parte
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Mr. *Pepys* and Mr. *Whitmarsh* then applied for liberty to present a petition for the appeal to be heard upon petition, under the discretionary power given to the Chancellor by section 3, 1 & 2 W. 4. c. 56, which enacts, that in all cases of appeal such appeal shall be on a special case, and in no other mode, except the Lord Chancellor shall in any case otherwise direct.

Mr. *Montagu* and Mr. *Wray* for the respondents said, that the intent of the legislature was, to prevent the time of the Chancellor, sitting on appeal, being consumed by an investigation of mere facts; and that by section 3 the determination of the judge on the settlement of the special case is final and conclusive.

[LORD CHANCELLOR:—That furnishes another reason why a petition should not be permitted to be presented. If, in an earlier stage of the proceedings, it had been suggested that the special case were improperly settled, the Court might have adopted some course by which that would have been rectified; but when once a case arrives here it is “final and conclusive” as settled by the judge. My opinion is, that it is not the meaning of the act that the Lord Chancellor should exercise the discretion to hear upon petition to rectify any defect in the special case which might appear at the hearing, but that if an application be made in the first instance, the Great Seal may, if it appear fit, direct it to be heard “otherwise than by special case;” but the appellants were the actors, and I think it is now too late.]

Mr. *Pepys* in reply:—There is no limit in the act as to time; and it could not have been the intent of the legislature that the settlement of the case should be binding, if improperly settled. This Court cannot

ascertain whether or not it be expedient to direct a case to be heard "otherwise than by special case," until that case has been heard. It cannot be contended, that if the special case state the facts so defectively that this Court is unable to decide thereon, that nevertheless there is no remedy, and the Court and the parties are bound by such statement.

1833.

Ex parte
Low.

In the matter
of
HOBSON.

Cur. ad. vult.

The LORD CHANCELLOR: —

Aug. 15.

The Bankrupt Court Act, by sections 31 and 32 taken together, gives an appeal generally on matters of law and equity, and particularly on the admission or rejection of evidence. If, then, the Court of Review decide on rejecting or admitting evidence improperly, such decision may be appealed against. It might be so under the general provision, being a matter of law and equity; and the particular provision as to evidence may be, on the one hand, contended to have been added rather for the purpose of making it clear that an appeal should lie in such a case, than to extend the appellate jurisdiction to any cases not within the general provision. From this view of the statute it would follow, that if the Court rejected evidence because it considered it superfluous, as not carrying the party's case further, an appeal would not lie for this cause. But it may be said, on the other hand, that the admission and rejection of evidence being specifically mentioned in sections 31 and 32, as well as matter of law and equity, something more must be intended than mere objections in point of law, and that all objections, of whatever kind, are included. But it is unnecessary to decide, in the present case, between those two constructions; for the admission of the circumstances offered to be proved would not countervail the other facts in the case, and if all were taken

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together there is enough to support the judgment of the court below.

As to the settlement of the special case, and the suggestion that part was struck out, the third section makes the determination of the judge who settles it "final and conclusive," and the power reserved to the Chancellor to hear appeals "otherwise" is not intended to meet such an emergency as the present. It was only to allow one course of proceeding instead of another, if he thought fit. A sound discretion must of course be exercised, governed by the particular circumstances. The rule is, to hear appeals on special cases; the exception, where another course would be more expedient for the great ends of all judicature—right decision with reasonable dispatch. In what manner this discretion should be exercised is not pointed out in the act. There seems nothing to prevent the Chancellor from directing, *mero motu*, upon reading the case, that another course should be adopted; but that is not a very probable occurrence. A preliminary application for the purpose, by petition, would be most according to the analogy of proceedings in bankruptcy. But this would give rise to multiplicity of petitions; and I shall consider what rule may be laid down on the subject. (a)

Here, however, no doubt can arise; for not only has this discretionary power no reference to the judgment of the judges on the settlement of the special case, but, even if it had, no application has been made, and no exercise of the discretion has been used. On the contrary, the party elected to proceed here by special case, and made no application complaining of the manner of settling it, or asking to proceed otherwise.

The judgment, therefore, must be affirmed, with costs.

(a) See *ex parte Keys, re Terry, post*.

Ex parte BARDWELL—In the matter of WILLIAM VENABLES.

L. C.
Feb. 13, 15,
1834.

JOHN JEX BARDWELL was brought up on a writ of *habeas corpus* to be discharged from a commitment by a Subdivision Court.

The warrant of commitment was as follows:—

“Whereas a fiat in bankruptcy, bearing date the 28th day of January 1834, was issued and is now in prosecution against *William Venables* of, &c., under which he hath been duly adjudged bankrupt: And whereas one *John Jex Bardwell*, being a person who was suspected to have obtained part of the estate and effects of the said bankrupt by means of certain colourable fictitious sales thereof made to him the said *John Jex Bardwell* by the said bankrupt, was duly summoned to appear, and did pursuant to such summons appear at the Court of Bankruptcy, Basinghall-street, on the 5th day of January 1834, before *Edward Holroyd* Esquire, a commissioner of the said Court of Bankruptcy, acting in pursuance of the said fiat, for the purpose of being examined touching and concerning certain matters which the said commissioner, by force of the several statutes now in force concerning bankrupts, was authorized to inquire into; and the said *John Jex Bardwell* being duly sworn true answer to make to the several questions put to him, and the several questions next following being put to him, he on his oath answered as is subjoined hereunder respectively:—

[Here the whole of that day's examination, which is very long, was set out (a), and the warrant then proceeded—]

The Subdivision Court cannot commit on an adjourned examination, after merely asking “do you abide by your former answers;” the party must be re-examined.

On a discharge under the *habeas corpus* act, the prisoner's costs paid by the assignees, the estate being sufficient to recoup them.

(a) The reporters consider it different opinion be entertained, unnecessary to insert the examination; but if, on reflection, a it will be annexed in an appendix at the end of the volume.

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Ex parte
BARDWELL.
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“And whereas the said *John Jex Bardwell*, being attended by a solicitor on his behalf, appeared at the Court of Bankruptcy aforesaid on the 11th day of January instant, pursuant to summons, before the said commissioner, for the purpose of being examined touching and concerning the matters aforesaid, the said several questions and answers so put and given on the examination aforesaid were read over in the presence and hearing of the said commissioner and of the said *John Jex Bardwell*; and being duly sworn true answer to make to the several questions put to him, he on his oath answered as is subjoined hereafter respectively; which said last-mentioned questions and answers are as follow:—

[Here the whole of the examination of that day was set out (a), and the warrant then proceeded—]

“And whereas the answers of the said *John Jex Bardwell* so given by him in the several examinations aforesaid having been unsatisfactory to the said commissioner, he the said commissioner did, on the said 11th day of February instant, duly commit the said *John Jex Bardwell* to the care and custody of *James Johnstone*, one of the messengers of the said court, to be by the said *James Johnstone* detained in his custody, and brought up before a Subdivision Court to be holden on the then following day, being this 12th day of February, and to which Subdivision Court the said commissioner did adjourn the examination of the said *John Jex Bardwell*:

“And whereas the said *John Jex Bardwell* having been duly brought up before us whose names and seals are hereunto annexed, constituting a Subdivision Court, the said several questions and answers so put and given

(a) See note (d) *ante*, 193.

on the said several examinations aforesaid were read over in the presence and hearing of us and of the said *John Jex Bardwell*; and the said *John Jex Bardwell* being duly sworn true answer to make to the several questions put to him, and the several questions following being put to him, he on his oath answered as is subjoined hereafter respectively as follows :—

“ Q. You have heard your examinations read over, and your answers to them; do you abide by them?— I do.

“ Q. Have you any explanation to give thereon?— No. I am ready to answer any question you may put to me.

“ Q. Did you give Dufton any thing for his services?—I made no agreement with him, nor have had any settlement with him.

“ Q. Do you wish to add any thing to your examination, or explain any part of it?—I do not.

“ Q. Do you then abide by your answers?—I do.

“ Which said answers so given on the said several examinations as aforesaid by the said *John Jex Bardwell* not being satisfactory to us, these are therefore to will and require and authorize you, immediately upon receipt hereof, to take into your custody the body of the said *John Jex Bardwell*, and him safely convey to His Majesty's prison of Newgate, and him there to deliver to the keeper of the said prison, who is hereby required and authorized, by virtue of the statutes aforesaid, to receive the said *John Jex Bardwell* into his custody, and him safely to keep and detain, without bail or mainprize, until such time as he shall submit himself to us, and full answer make to our satisfaction to the questions so put to him as aforesaid; and for so doing this shall be your sufficient warrant. Given under our hands and seals, at the Court

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—
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of Bankruptcy in Basinghall-street, this 12th day of February 1834.

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Ex parte
 BARDWELL.
 In the matter
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 VENABLES.

“ J. H. MERIVALE. (L.S.)

“ J. S. M. FONBLANQUE. (L.S.)

“ E. HOLROYD.” (L.S.)

Mr. *Pepys*, Mr. *Ching*, and Mr. *Bethell* for the prisoner :—

The warrant is defective for two reasons :

1. Because it appears that the prisoner was not examined by the Subdivision Court, but was committed on his examinations before a single commissioner.

2. Because it does not appear on the warrant in respect of what the Subdivision Court was dissatisfied with the examination.

The sections of the Bankrupt Court Act under which the Subdivision Court derives its power of commitment are the 6th and 7th. Section 6 enacts, “ That the said six commissioners may be formed into two Subdivision Courts, consisting of three commissioners for each court, for hearing and determining the matters and things and making the examinations herein-after referred to,” &c. ; and section 7 provides, “ That no single commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger or other officer of the said court, to be by him detained in his custody, and brought up before a Subdivision Court or the Court of Review within three days after such commitment, for which purpose one of such courts shall be forthwith assembled, and to which court such examination shall be adjourned.”

It appears on the face of the warrant that the directions of the act have not been complied with, by the examination of the witness being adjourned to the Sub-

division Court. That court was bound to examine the prisoner, and has no power to commit upon the examination taken before the single commissioner. How is the prisoner to discover the grounds of dissatisfaction entertained by the Subdivision Court, who ought to commit him in consequence of their dissatisfaction, if they do not, by examining him themselves, point his mind and direct his attention to those matters of which, in their estimation, he has given an unsatisfactory account?

At the conclusion of the first day's examination before Mr. Commissioner *Holroyd* no dissatisfaction was expressed, and the prisoner was not summoned again for further examination until the 11th, being an interval of seven days between his first and second examination; notwithstanding which the whole of that examination is inserted in the warrant as unsatisfactory, and the prisoner committed "until he shall full answer make to the questions so put to him," including, therefore, those which were satisfactorily answered. It does not appear upon the warrant in what respect the Subdivision Court was dissatisfied with the examination. This is a defect; and the examination is satisfactory in the only light in which the Subdivision Court has the power to view it. If the witness fully answer the questions put to him, and his whole examination be consistent, the Subdivision Court has no power to say that it is unsatisfactory on the ground either of the improbability of the facts disclosed or of a disbelief in the court founded on extrinsic knowledge. No case can be produced in which a witness has been committed on the ground that his answers were incredible. Bankrupts, it is true, have been so committed, but they are examined in a very different character from mere witnesses. *Ex parte Vogel*, 2 B. & Ald. 219, in which a witness was committed, turned on the relevancy and

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legality of the questions proposed, which were not contended to have been satisfactorily answered; but no other case of a witness being committed, who has fully and with consistency answered the questions proposed to him, can be produced. In *ex parte Nowlan*, 6 T. R. 118, and every other case deciding the same point, the party examined was the bankrupt.

There are some questions in this examination which are illegal, and others irrelevant, and the prisoner is committed until he shall full answer make to the satisfaction of the commissioners to the questions so put to him as aforesaid. He is committed then, not only till he shall answer satisfactorily to all those questions which the Court had a right to put, but also to those which are irrelevant and improper. This is another fatal defect, and one of substance, and not merely of form. *Ex parte James*, 1 P. Williams, 611.; *Rez v. Nathan*, 2 Strange, 880. *Ex parte Cassidy*, 2 Rose, 217.

LORD CHANCELLOR :—I do not think any of the questions are improper or irrelevant; but the grounds upon which the examination was deemed unsatisfactory ought to appear upon the face of the warrant, which must serve at once as an indictment and evidence against the prisoner. I wish the counsel for the assignees to direct their attention to that point.

The *Attorney General* (a) and Mr. J. Russell, for the assignees, in support of the commitment :—

The form of the warrant is sufficient, for it is not to any particular questions that the answers are unsatisfactory, but on the general tenor of the whole of the examination it is impossible to believe the answers to be true. (b)

(a) Sir William Horne. (b) *Ex parte Vogel*, 2 Barn. & Ald. 219.

The assignees had reason to believe that shortly before the bankruptcy there had been fraudulent removals of property, to conceal which they also believed there had been fictitious sales; and, suspecting the prisoner to have received some of the property so removed, they caused him to be summoned, and he appeared before the commissioners, not merely as a witness, but, in the character pointed out by the legislature in 6 G. 4. c. 16. s. 33, as a person suspected of having property of the bankrupt in his possession, of which he had possessed himself by means of the colorable sales.

The substance of his examination is shortly as follows:—he describes himself as a general dealer in every thing bought and sold; and then he says that, hearing that goods were to be bought cheap, he gave money to a third party named *Dufston*, who was inseparably connected with him, to make purchases, and that *Dufston* made the several purchases, but he (the prisoner) never saw the invoices (seven in number), as *Dufston* bought the goods and sold them, and then applied the proceeds in purchasing other lots; but he is unable to state the amount of money he gave with any greater accuracy than by saying it was from 150*l.* to 200*l.* And although the purchases so made amount to 500*l.* or 600*l.*, he can give no account, but admits that a memorandum was shown to him by *Dufston*, which he does not produce, and from which he says a loss appeared upon the transactions, and yet he continued to make purchases.

The story contained in the examinations is so incredible that it must be, as it was to the commissioners, unsatisfactory to any judge, and contains such internal evidence of improbability as to justify the commitment.

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The LORD CHANCELLOR:—

This case was argued last Saturday, and occupied, as such cases usually do, the whole day.

Bardwell was summoned, and appeared on the 5th day of July at the Court of Bankruptcy, before a commissioner acting under a fiat against *Venables*, and he was examined at some length touching certain matters connected with the bankruptcy. The examination was continued on the 11th of February, before the same commissioner, *Bardwell* being then attended by his solicitor; and his answers being unsatisfactory to the commissioner, he was committed to the provisional custody of the messenger, according to the provisions of the act of the 1 & 2 W. 4. c. 56. s. 7; and a Subdivision Court was holden the next day, when his former examinations being read over to him in presence of the three commissioners, he was asked if he abided by them, and said he did—and if he had any explanation to give, and said he had not, but was ready to answer any question put. One question upon the subject matter of the former examinations was then put, which he answered in a manner which, taking the question by itself, could not be deemed unsatisfactory or in any way objectionable; and being again asked if he wished to add anything by way of explanation, he said he did not—and if he abided by his answers, and he said he did. The Subdivision Court, deeming the answers given upon the “said several examinations not satisfactory,” proceeded to commit him.

A recital on a warrant that the party was “suspected to have obtained part of the bankrupt’s goods by means of fictitious sales,” is not objectionable.

The warrant which is brought before me as the return to the writ of *habeas corpus* which I issued to bring up the prisoner sets forth the above matters and the examinations at large, and the first objection taken is, that it recites also what is said to be unnecessary and detrimental to the party, viz. “that he was a person suspected to have obtained part of the estate and effects of

the bankrupt by means of certain colourable and fictitious sales thereof made to him by the bankrupt."

But there is nothing objectionable in this recital: it is quite within the description of the enactment, 6 G. 4. c. 16. s. 33, giving the commissioners power to summon and examine persons other than the bankrupt; it is within the particular description of "any person known or suspected to have any of the estate of the bankrupt in his possession;" and it is within the more general description of "any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt," and also within the yet more general description of "or any information material to the full disclosure of the dealings of the bankrupt." All these matters,—as to the imports of all these expressions,—were very fully discussed many years ago in the Court of King's Bench, and more than once since the 6 G. 4. Had those expressions been followed, no such objection could have been taken; but the language used is more specific, and, so far from being detrimental to the party, it profits him much, by giving him a more precise knowledge of the charge against him. If this particularity were used in the summons, although I know not whether it were or not,—probably not, there being no necessity for it,—yet, if used, it materially benefited him, for he thereby had more distinct knowledge of the matter alleged respecting him. If it be only used in the warrant he has an advantage, though a lesser one, in the fuller information on which he comes up to maintain his right to be discharged.

However, even if there had been any thing in this formal objection, yet the statute (a) would oblige the Court to enter upon the merits, and, notwithstanding any such defect of mere form, to re-commit, if the merits require

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(a) 6 Geo. 4. c. 16. s. 39.

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The warrant
 need not set out
 the precise
 answers with
 which the com-
 missioners were
 dissatisfied.

it. If precedents were wanting in so clear a point, *ex parte Vogel*, 2 B. & Al. 219, might be referred to, where the warrant contained similar specifications of the suspicion entertained; and though every other objection was taken to the warrant, none was attempted on this ground.

The next objection taken goes more to the substance; that the warrant does not precisely state what the answers were with which the commissioners were not satisfied. It is said, that, so far as the warrant shows, the party could not discover, from any thing that passed, wherein he had failed; and that in this ignorance he must remain in custody indefinitely, he having no means of supplying a defect not pointed out, or of giving a satisfaction on he knows not what.

It is undeniable that the warrant must set forth such specification of questions and answers as shall suffice to show the Court before whom the matter is brought what were the grounds of the dissatisfaction felt by the commissioners, and that those grounds must be such that in the Court's judgment the commissioners are well justified in pronouncing the answers unsatisfactory. But it is not correct to say that the commissioners were bound to point out any particular answer, or number of answers, as those which failed to satisfy them, or that the warrant should state such particulars. (a)

The act of 6 G. 4. c. 16. s. 39. requires, as did the former act, 5 G. 4. c. 30. s. 17, that the warrant should specify every question for not fully answering which the party shall be committed; with the addition of a power not given by the 5 G. 4, but given by the 6 G. 4. c. 16. s. 39, enabling the court before which he is brought to look into all the rest of the examination, at the prisoner's desire, and for his benefit. But it is nowhere required that the particular questions shall be

(a) *Ex parte Vogel*, 2 Barn. & Ald. 219.

singled out from among others as having been those unsatisfactorily answered, provided those be all given, and that it is not necessary to look beyond the warrant for the grounds of the commitment. It is necessary that every part of the examination on which the commissioners formed their opinion should be set forth, as was held in *Crowley's* case, 2 *Rose* 396, and *Lawrence's* case, 2 *G. and J.* 209, and other cases. (a) But there is no necessity for stating what questions, among the whole set forth as asked, were those with the answers to which the commissioners were dissatisfied.

In *ex parte Harrison*, 1 *Barn. & Adol.* 410, in the Court of King's Bench, a very late case, the warrant set forth the whole examination, which was of great length, as the report states it, and the objection taken was, that it did not specify any of the questions to have reference to the matters into which the commissioners were authorized to inquire. But the Court was clear that if, by looking at the whole examination, it appeared to relate to matters within their jurisdiction, that was enough. No objection was taken that the warrant did not specify which of the answers were unsatisfactory, and yet the other point was elaborately supported. The Court was so clear as to hear only one side. Again, in *ex parte Vogel*, 2 *B. & Ald.* 219, a long examination is given, as stated in the warrant, and the whole together is made the ground of dissatisfaction, although many of the answers taken by themselves are such as no one could think were not perfectly explicit and direct, and in that sense satisfactory. But the Court held that the whole must be taken together. The Chief Justice said, "An answer to one particular question may be either satisfactory, or not, accordingly as it bears upon other questions

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(a) *Tomlins' case*, 1 *G. & J.* 373; *Price's case*, 2 *G. & J.* 211
Atkinson's case, *ibid.*

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propounded to the witness; and the only way, therefore, to come to a proper conclusion, is to look at all the questions and answers collectively, and to consider them as constituting one entire examination." Mr. Justice *Holroyd* fully agrees in thinking, that we are to take the whole examination together, and see if the answers, taken collectively, appear unsatisfactory. It is manifest that if such be the rule, and it is the only rational one which can be laid down, there can be, generally speaking, no more specification of the unsatisfactory answers than we have in the present case. No precedent has been produced of a greater specification of the unsatisfactory answers than by setting forth the examination, and adding, as in this case, that the said answers were not satisfactory to the commissioners. It is, I believe, the course adopted in all the cases reported; and Lord *Eldon*, in one of them, *Coombes' case*, 2 *Rose* 396, observes, "Suppose a case of an examination in which twenty questions have been put, and six only of those answers have been unsatisfactory, and the rest satisfactory; is it not most material that the whole of those questions and answers should appear upon the warrant?" This clearly means that the whole twenty are to appear, and the commissioners are not to draw the line, and say, six of the answers were satisfactory, and the other fourteen were unsatisfactory.

If, however, it appeared to the Court that the examination taken altogether did not disclose with sufficient distinctness in what respect the commissioners had been dissatisfied, I need hardly observe that the commitment could not stand; for it would be still less possible to tell from such a record whether their dissatisfaction were well grounded or not. Nevertheless it will not be sufficient to show, as has been contended, that, taking some distinct answers of the party by which he negatives the whole charge made against him, and supposing that answer true, that the transaction in question fails to

affect the bankrupt or the estate under administration, and that consequently there is no authority to commit (a).

Thus taking the charge to be, as in this case, that the sale was colourable, though the transaction, in fact, was a real transfer of the bankrupt's goods to the witness, it is contended, that because he swears very distinctly to having bought the carpeting in question through a person in his occasional employ, and with his (*Bardwell's*) own money, and because, if this be true, there is an end of all fictitious or fraudulent or colourable transactions, and there has been a real sale, that consequently there is an end of the inquiry as regards this bankruptcy, and that the witness could give no other answer, and the commissioners never can be better satisfied so long as he continues to speak the truth. Such is the argument. But this is truly begging the question. It is because, upon the whole of his evidence taken together, the commissioners do not believe him to be speaking the truth on this part of the case, that they are dissatisfied with his answers generally, and commit him. To hold otherwise would, in effect, be returning to the old principle long since exploded, but which will be found adopted by the Court of King's Bench so late as Lord *Mansfield's* time, that a distinct swearing must be taken to be satisfactory, provided if true it would be satisfactory. It has been further urged that the Court runs a risk of continuing a party's imprisonment indefinitely, when he may all the while be giving a true account, inasmuch as he cannot alter it without substituting a false account: the answer is almost too obvious to require being given. All courts that have to deal with facts must draw inferences from evidence, and run

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(a) Positive swearing is now not the test. Per Lord *Eldon*, *Coomb's case*, 2 *Rose*, 398.

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the risk of coming to erroneous conclusions. It is a serious misfortune for the party in such cases to suffer by an error, however honestly committed; and it is a misfortune which every court falling into such an error will always feel and regret as if it had befallen itself. But that is not peculiar to a party committed in the course of such proceedings as these, nor to the tribunals by which these proceedings are conducted; similar errors, from which no human tribunal is exempt, and against which no human precaution can always guard, may lead to still higher penalties, and therefore to greater misfortunes. If such courts act with due caution, and with a constant feeling of their responsibility, they may with a safe conscience, deciding upon circumstantial evidence, follow the greater probabilities of the case, where absolute certainty is from the nature of the thing unattainable.

Collateral questions, trying the truth of a material part of the witness's story, may be put.

It has also been objected, that the commissioners had no right to put questions to *Bardwell* touching sales to *Schoolbred* and Co.; and that being unauthorized, they were illegal, and vitiate the whole warrant. But I am of opinion that there was nothing illegal in that part of the examination; it was plainly introduced to try the truth of a material part of the witness's story, as to his having no warehouse, or place to put the goods in, which he said he purchased through *Dufston* because he had no such place. Nor could this Court possibly tell that this examination was not fit to be pursued as far as it is carried, without knowing to what points it might be directed, the commissioners having the power, as was clearly held in *ex parte Vogel*, 2 B. & Ald. 219, to examine a witness respecting individuals. This is the last of the cases respecting individuals "other than the bankrupt," if through them "they may be likely to obtain information concerning the bankrupt's estate and

dealings." Mr. Justice *Hobroyd* said, "If the questions be illegal, the party should demur to them before the commissioners." I feel great veneration for every thing that fell from that most able, learned, experienced, and venerable judge; but I venture to express my own doubt, whether the question, being as to the admissibility, in point of law, of a question put by a commissioner to a comparatively ignorant party, ignorant of law, no doubt, and who may be unprovided with counsel or even a solicitor at the time—I venture to doubt how far, that question appearing on the face of the warrant, and it being not clear that the answer might not be one of the grounds of the commissioners being dissatisfied; and therefore the ground of the committal—whether it would not be a sufficient and due time to take an objection to the warrant, on that ground, on the *habeas corpus* being returned, and the return disclosing the illegal question. I venture, with very great deference to that learned judge, to express my doubt—I go no further—whether it would be competent for the Court or the opposite party to contend, that you are then too late with your objections, for you ought to have demurred to the question; because the warrant in all particulars must appear to have been supported by that which is set forth on the face of the warrant, and that if an illegal question be put, and it do not appear upon that warrant which answer the dissatisfaction arose on, and therefore on what answer the committal was made, *non constat* it may be said it was not on an answer to that question which the commissioners put illegally, and which they, by their return, as set forth in the warrant, admit to have been one of the questions put, and which they do not sever from the rest. It is possible this may be a misreport of what fell from

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On *habeas corpus*, the party may object that a question was illegal, though he did not so object when before the commissioner.

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Mr. Justice *Holroyd*, but seeing it on the face of the report I could not pass it over. (a)

Were I then only called on to decide here whether or not this warrant be sufficient, I should have no doubt, nor have I any difficulty in holding, that the ground of the commitment appears adequately disclosed upon the face of the warrant. The object of the inquiry is clearly to be seen in the questions; it is the witness having only colourably bought from, but really received for the bankrupt, part of his estate. The reason of the dissatisfaction of the commissioners with the answers is equally apparent; and the party could be at no loss to tell what that was. He must have known that the commissioners were not satisfied with his account of the transaction, taken as a whole; that they did not believe his account; that they considered him as mis-stating some things, and keeping back others; and that, judging by very strong probabilities, such as men daily and hourly put their faith in, rest their conduct on, and are habitually guided by, they disbelieved the greater part of his story, and all of it that was material to the subject of their investigation. If the commissioners be right in this conclusion, he can have no difficulty in comprehending how he is "to submit himself to them, and full answer make to their satisfaction;" that is, if he have stated that which is not true, the way to satisfy the commissioners will be to state that which is true,—to give them that true account which they are in quest of. But it is also possible he

(a) See *ex parte Meynot*, 1747, 1 *Atk.* 200. *Ex parte Farr*, 1804, 9 *Ves.* 513. *Ex parte Nolan*, 1805, 11 *Ves.* 514. *Nobes v. Mountain*, 1822, 3 *Brod. & Bing.* 237. D. *Burrough, J.*, and *ex parte Isaac*, 1828, *Mont. & Mac.* 23. From which it appears that the use of the word "demur" on these occasions has been supposed to be, that the person under examination may object to answer the question, as not being a legal question; and the Court will judge of its legality on the return of the *habeas corpus*.

may, by stating other circumstances not hitherto disclosed, explain some parts of his evidence at present full of suspicion, and even show that the whole story is consistent and credible, which, at present, the commissioners have held it not to be. They will then be satisfied, though in another way.

I believe the last party committed and brought up on a *habeas corpus* since the act (a) passed, urged much the same argument, on the impossibility of knowing how he was to satisfy the commissioners, because he had already told all he knew; yet, on his further examination, when again brought up, he told the truth, and did satisfy them. I rather think such was the case; I have no very distinct recollection of it; but that is the impression on my mind from what I heard at the time.

The question would now arise whether, upon carefully examining the evidence, I have come to the same conclusion with the commissioners, or am of opinion that the story now appearing upon the warrant is such as ought to have satisfied them? But whatever may be my opinion upon this important point,—I have not perhaps much concealed it,—the view which I take of one part of the proceeding renders it unnecessary that I should explicitly state it, for I think that there is a fact apparent in the warrant which makes it fit that the witness should undergo another examination.

It appears that one commissioner alone examined him at the two first meetings, and, being dissatisfied, committed him provisionally to the messenger. When I look at the story told by the witness in those two examinations, I have no doubt whatever that the learned commissioner acted correctly in ordering the provisional commitment, and was justified in not being satisfied with the answers given; but when the case was then ad-

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(a) 1 & 2 W. 4. c. 56.

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journed to the Subdivision Court, I do not think that the Court sufficiently complied with the provisions of the act in merely taking the examination of the single commissioner, putting another question, and then asking if the witness abided by his former answers, and abided by them without further explanation, which it is to be observed is all that was done by the Subdivision Court. The course of the transaction was this:—two long examinations taken by one commissioner proved unsatisfactory to that one commissioner; he commits provisionally to the messenger, under the authority of the act which excludes his jurisdiction to commit otherwise than provisionally to the messenger, for the purpose of safe custody, with a view to a further proceeding, and that proceeding expressly not to be before less than three, and that commissioner himself being one of the three. Such being the provision of the act, he pursued it strictly, and, in my opinion, most correctly, by taking the first two examinations, and was rightly dissatisfied with the result of those examinations,—right in expressing his dissatisfaction, and in committing to the custody of the messenger. But then the Subdivision Court being assembled merely takes by way of report, from the single commissioner, the examinations which he had previously taken in the absence of his colleagues, and merely reads these examinations over to the witness, adds one question, and one only, and then asks whether or not he abides by the former answers, and whether or not he wishes to explain any of those former answers. This is all that is done by the Subdivision Court, which immediately says it is dissatisfied, and proceeds to commit; and upon that state of facts the question arises, which in my opinion is a very important question of practice. If the single additional question had been such as, taken with the former examination by which he in the

presence of the whole Subdivision Court abided, showed the whole story to be unsatisfactory—if that single question had shown a prevarication, a direct contradiction—if that question had elicited an answer unsatisfactory to all the preceding questions which they might have compressed into their single question—if that had been unsatisfactory, then the proceeding might have been regular; because, strictly speaking, the opinion of the three commissioners would have been formed on what had passed before themselves, and on that only. (a) But, in fact, their judgment was formed upon the answers given in their absence to questions put in their absence; and all they knew was, that he acknowledged having been asked those questions and having given those answers.

It appears to me that the statute intended to give the party under examination the security of three judges being present, presiding over his examination, and forming their opinion upon hearing and seeing him answer the questions put. If it be only conceivable that they might have come to a different conclusion, from being personally present, from that to which reading the deposition led them, it is enough, provided that difference be in favour of the party committed. Nothing, indeed, in the manner of his deposition, could be a ground for concluding against him, because the record of his examination must contain enough to show that he was deservedly committed; and if the written testimony prove nothing against him, his manner of giving it personally is quite immaterial. It is enough to show that a difference might exist between the whole Subdivision Court assisting at the examination and one commissioner taking it in the absence of the other two, who

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(a) *Ex parte Atkinson*, 2 Gl. & J. 208.

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only hear the witness acknowledge it. The provision of the act appears to be intended to give him the benefit of such a possibility. But further, if those two commissioners had been present, it is also possible some further questions might have been suggested by the colleagues of the single commissioner which would have drawn forth answers favourable to the witness, and of that possibility also the act seems to intend to give him the advantage.

It is true the seventh section, upon which I think this construction ought to be imposed, does not explicitly direct the examination to be re-commenced by the Subdivision Court; it uses the word "adjourned" in a way that has probably introduced the practice of only continuing the further examination before the three, beginning where the single commissioner had left off. The party is to be brought up, according to the act, within three days, before the Subdivision Court, "to which such examination shall be adjourned." This, and the consideration that in almost every case the reading over the former examination, and giving the party full opportunity of retracting or altering or explaining it, has probably appeared sufficient to satisfy the exigency of the statute, and to make the difference which I have pointed out to appear so inconsiderable as rather to seem a matter of form than of substance;—that I take to have been the origin of this practice. Nor should I, upon the other provisions of the statute, have been disposed to put so large a construction, or to correct any practice that might have grown up, or rather begun to take root, under a more liberal interpretation of the words; but when the matter in question is the power of commitment, it behoves us to enlarge whatever tends to throw guards around the liberty of the subject, and to construe most strictly whatever confers the authority to imprison. That is the ordinary and sound rule of construction.

The seventh section expressly prohibits one judge from committing; and although it does not say in terms that the whole inquiry shall be conducted by all who concur in pronouncing the sentence, yet I think that, in soundness of construction, it must be held to mean, that they who alone have the authority to make the order shall all join in the inquiry out of which the order is to spring, and not rest satisfied with taking from one of their number the report of an inquiry conducted by him before they were called in, and then, as it were, adhibiting their authority to give his opinion legal effect. It must be their order, as well as his, in substance as well as in form.

I consider that this is sufficient, on the present occasion, to vitiate the commitment. Undoubtedly I am empowered, where a warrant is bad in point of form, to remand, if on the merits the prisoner appear to be properly committed (*a*); but I do not consider this a defect of such a kind as ought to be thus supplied; and I find, that in a case *ex parte Cassidy*, 2 *Rose*, 217, in which Lord *Eldon* having a doubt passing over his mind whether he had a right (the words of the act empowering and requiring to commit if the Court shall think there be an error in form, but yet that the party in substance appeared to be rightly committed,) to neglect that power which was given, he considered what the nature of the objection was, and being of opinion that it was a flaw, but more important than could have been contemplated by the legislature when they made this act, his Lordship discharged the prisoner, although that was perhaps more near a formal objection than the objection I now take to the present commitment. I have, therefore, no doubt that I am not called upon, and I shall

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(a) 6 G. 4. c. 16. s. 39.

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not exercise the power of keeping the prisoner in custody. I shall discharge the prisoner on this ground — on this ground alone, desiring it to be most distinctly understood that it is on this ground, and on this ground alone, that I order him to be discharged.

Mr. *Pepys* asked, that the witness might have all his costs out of the estate.

A prisoner regularly committed by a commissioner to the messenger, and subsequently irregularly committed by the Subdivision Court, is not, on a discharge under habeas corpus, remanded to the custody of the messenger.

The LORD CHANCELLOR:—The prisoner was brought up regularly before the Subdivision Court, and the irregularity did not begin till the moment the warrant of commitment was made. I had a doubt at one time whether I should not have been justified in putting the matter back to that stage in which I think all was regular, namely, to the stage of the commitment by the one commissioner; but on more carefully looking into the act, I do not think I should be justified in so doing, therefore I must give the witness the costs from that time, to be paid by the assignees, who will recoup themselves out of the estate, which I understand to be sufficient.

Prisoner discharged. His costs from the time of commitment by the Subdivision Court, to be paid by the assignees. (a)

MORGAN v. RHODES.

L. C.

March 19,
1834.

An agreement for a lease is not annulled by the bankruptcy of the intended lessee.

THIS was an appeal from a decree of the Vice-Chancellor, who had determined that the bankruptcy of the lessee exonerated the lessor from an agreement for a lease.

The material facts, as stated by the Lord Chancellor in his judgment, are as follow:

(a) See *Turner v. Hibbert*, post.

Rhodes, on the 23d of *February* 1822, agreed with *Auckland* to grant him a lease for ninety-seven years of certain premises at 20*l.* per annum rent, upon which *Auckland* agreed to build six houses. This building was, with the rent reserved, the consideration of the intended lease; he agreed to erect, build, and completely finish fit for habitation six messuages on or before the 1st of *March* 1823, besides other things immaterial to the present question. *Auckland* sold his interest in the agreement as to three of the messuages to *Mrs. Morgan* for 600*l.*, and an improved ground-rent; 204*l.* was immediately paid, and *Auckland* afterwards became bankrupt. This suit was for a specific performance of *Rhodes'* agreement with *Auckland* to grant a lease of these three houses, upon *Mrs. Morgan* performing her part of the agreement, and having an account of what was due to her. The Vice-Chancellor dismissed the bill on the ground of *Auckland's* bankruptcy, and this was an appeal from his Honor's decision.

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The *Solicitor General* (a) and Mr. *Jacob*, for the appellants, cited *Crosby v. Tooke* (b), in which the Lord

(a) Sir *C. Pepys*.

(b) *Crosby v. Tooke*. A person named *Pitmore* had entered into an agreement with the defendant *Tooke* to take the lease of a certain farm. Before the lease had been executed *Pitmore* became insolvent, and the plaintiff, *Crosby*, entered into possession of the farm as his assignee. The defendant proceeded to eject the plaintiff, who obtained an injunction to restrain him; this injunction was afterwards dissolved by the Vice-

Chancellor, on the ground that as *Pitmore* had become insolvent before the lease was executed, *Tooke* was absolved from his agreement.

The present was a motion made before the Lord Chancellor by Mr. *Pepys* that the injunction might be revived, for that if *Pitmore* had become a bankrupt, his assignee would have been bound by 6 Geo. 4. c. 16. s. 75. to perfect the lease or abandon the contract; and that it never could have been the intention of

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Feb. 23, 28,
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An agreement for a lease is not annulled by the insolvency of the intended lessor.

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Chancellor, on appeal, reversed the judgment of the Vice-Chancellor upon the same point. And they said, that the present case had been decided by the Vice-Chancellor, upon the principle of his judgment in *Crosby v. Tooke*, before the reversal of that judgment on appeal; and they cited *Powell v. Lloyd*, 1 Yo. & Jer. 427, which had been cited in *Crosby v. Tooke*.

The LORD CHANCELLOR, after stating the facts as above, proceeded as follows:—

All these conditions and stipulations, together with a clause in contemplation of bankruptcy, (to which I shall afterwards advert more particularly,) are in a printed form with blanks, being apparently the form adopted on the whole of the Beauvoir estate, in which *Rhodes* had obtained an interest, the subject of much litigation in this Court; but there is a very material addition made to the printed contract in writing, and immediately pre-

the legislature that the insolvency of a person who had entered into an agreement should absolve the other contracting party from his obligations.

Sir *E. Sugden*, *contrà*, contended that this was a personal agreement with *Pitmore*; and that *Pitmore's* inability to perform his part of the agreement by reason of his insolvency had absolved the defendant.

The Lord Chancellor said, that if the assignee were solvent, and were able to enter into the covenants of the lease, there was no law to deprive him of the benefit of the agreement. An agreement is not to be set aside by operation of law. This was laid

down in a case of *Wetherell v. Geering*, 12 Ves. 504, as also in *Doe & Mitchinson v. Carter*, 8 Term. Rep. 5, in which last case an assignment of a lease by means of a judgment on a warrant of attorney was held to be no forfeiture thereof, although there was a covenant against selling or assigning.

His Lordship discharged the Vice-Chancellor's order, dissolving the injunction upon the assignee undertaking to pay the rent which was then due within three weeks.—Such is a note in the Law Journal, New Series, vol. ii. (Chancery), page 85. I understand that it is not quite correct.—B. M.

ceding the signature of the parties and the attestation of the witnesses. It is that *Rhodes* agrees to provide the bricks for building the six messuages, at the usual prices, and gives credit for them until the granting of the leases, not exceeding three years; and further, that he will grant a lease of each house when covered in, and certified to be so by *Auckland's* surveyor.

That this is a most material variation of the contract, as it would have stood upon the preceding printed portion of the instrument, there can be no doubt; for, first, it contemplates a granting of the lease, not when the houses are finished, or before the 1st March 1823, which is twelve months from the date, but at any time within three years from that date; and, next, it obliges *Rhodes* to grant the leases as the houses are roofed in, and not when the whole six are finished. It thus puts an end both to the finishing in twelve months as a condition precedent to the demise, if it could so have been construed upon the former part of the agreement, and also destroys the entirety of the contract, giving *Auckland* a right to have his lease of the houses severally as they were covered in.

Now the evidence in the cause is clear that the three houses for which a lease is prayed by this bill were covered in, and certified to be so.

The court below proceeded chiefly, indeed almost entirely, on the bankruptcy of *Auckland* determining his right to the lease. The case of *Crosby v. Tooke* removes this ground, and of the point in that decision I entertain not the least doubt, nor ever did.

But it is said there is a clause of forfeiture in this agreement. It is, however, not such a clause as, if inserted in the lease to be granted, would have worked a *cesser* of the term. On the contrary, this is carefully

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avoided; *Rhodes* is only in that case and other cases provided for to enter and take possession and sell and dispose of the agreement and all benefit thereof, and the premises for the term agreed to be demised, subject to the rent, and to receive the purchase money for the term of agreement, and pay over the residue to *Auckland*, his executors, administrators, or assigns, after deducting the expenses incurred by the proceeding. The bankruptcy therefore, far from extinguishing the term, or right to have a term demised, keeps alive the former if the agreement shall have been carried into execution, and the latter, if it remain still *in fieri*. It is needless to add any observations upon the fact, not unimportant, that *Rhodes*, by the purchase he afterwards made from the assignees under *Auckland's* commission, is, in truth, now to be considered as *Auckland*, and that he allowed Mrs. *Morgan* to lay out her money on the premises after her supposed forfeiture, whether by the lapse of time before finishing the houses, or by the bankruptcy.

The decree of his Honor dismissing the bill must therefore be reversed. I need not enter at all into the question of the houses not having been built within the time first specified, of one year; the subsequent part of the agreement clearly shows that this was no condition precedent to granting the lease; and if it were a concurrent stipulation it cannot affect the right of the plaintiff to have a performance; it can only give *Rhodes* a ground of action against her for not performing her part of the agreement.

Ex parte RICHARD FARDEN and ANNA MARIA his wife. — In the matter of WILLIAM PETERS.

C. R.
June 7,
1833.

MR. SWANSTON and Mr. *Flather* for the petition :—

In April 1828 the petitioners filed a bill in Chancery against the bankrupt and others, praying that the partnership in the bill mentioned might be dissolved, and for an account, &c. On the hearing the Master of the Rolls referred it to the master to take the account; and his report, &c., having been made, came on to be argued, with exceptions, when the Master of the Rolls made a further reference to the master, and in the meantime ordered the bankrupt to pay 606*l.* and 1,400*l.* into court.

A person having been ordered to pay a sum into Chancery, became bankrupt without having done so; a supplemental bill was filed against his assignees, but no order made thereunder. Ordered, that a claim be entered for the sum.

Before any further proceedings, viz. in December 1832, a fiat issued against the bankrupt, whereby the suit and proceedings became defective.

On the 24th of December 1832 the petitioners tendered a proof upon the foundation of the master's report, but the commissioners refused to allow any claim to be made, unless they proceeded to take the account, which had already been taken by the master.

On the 19th of January 1833 the petitioners filed their supplemental bill against the assignees of *W. Peters*, who appeared, and admitted the facts.

A meeting under the fiat was advertised for a final dividend, and the petitioners were apprehensive that the whole of the bankrupt's estate would be then divided.

The debts proved under the fiat did not exceed 300*l.*

The petition prayed that a claim might be entered for 606*l.* and 1,400*l.*, without prejudice to the right of

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proceeding in the suit, and that the assignees might be ordered, out of the assets in their hands, to pay into the Bank, to the credit of the accountant general, to the account of this petition, a sum sufficient to pay a dividend on the sum of 606*l.* and 1,400*l.*, rateably with the other creditors who had proved; and that any future dividend might be declared upon the said claim; and that the costs of and incidental to the petition might be paid out of the bankrupt's estate.

Ordered as prayed. Costs of this application to be costs in the cause in the Court of Chancery. This order to be entered with the registrar of the Court of Chancery, if that court pleases.

C. R.
Dec. 17,
1833.

Ex parte HANCOCK.—In the matter of GILBURD.

A party having been ordered to pay money into court, became bankrupt without having done so; a supplemental bill was filed against his assignees, but they had not appeared. Ordered, that a claim be entered for the sum.

THIS was the petition of *Charles Hancock* and *Mary Ann Hancock*, infants, by *William Hancock*, their next friend, for leave to enter a claim.

John Gilburd, deceased, after leaving all his property to his wife for life (who was since deceased), devised the same to his sons, *William Gilburd* and the petitioner *Charles Hancock*, their heirs, &c., in trust to sell, and divide the proceeds amongst his children. All his daughters had died but the petitioner *Mary Ann*, who had married *Charles Hancock*.

In August 1832 the petitioners, by their next friend, exhibited their bill in Chancery against *William Gilburd* and others, to establish the will.

In January 1833 it being admitted by the answer, that *William Gilburd* had a sum in his hands, it was ordered,

that he should pay 596*l.* 12*s.* into the Bank, to the account of the plaintiffs. To enforce this order an attachment issued, but he was not taken thereunder. In June 1833, on the hearing, the Master of the Rolls established the will; when the usual reference to the master to take the account was made, and *William Gilburd* again ordered to pay 596*l.* 12*s.* into court. On the 4th of August 1833 a fiat issued against *William Gilburd*, whereby the suit became defective; and the petitioners, in November 1833, filed a supplemental bill, making the assignees parties, and praying that a sufficient sum might be set apart out of the bankrupt's estate to answer what should appear due from the bankrupt's estate on taking the accounts directed by the decree. The assignees had not yet appeared to the supplemental bill, or put in their answer thereto. A dividend meeting under the fiat was advertised for the 1st of February 1834, and the petitioners were apprehensive that the whole of the estate would be then divided.

The petition prayed that a claim might be entered for 596*l.* 12*s.*, without prejudice to their right to proceed with the suit, and that the assignees might be ordered to pay into the Bank of England, to the credit of the accountant general, in trust in the original cause or in the matter of this petition, a sum sufficient to pay the dividend; and that the assignees might be ordered to set apart a sufficient sum to answer such further demands, upon taking the accounts directed by the decree, as should appear due from the bankrupt to the petitioners.

Mr. *Swanston*, for the petition, stated that a similar order had been made in *ex parte Farden* (a); and he

1833.

—
Ex parte
HANCOCK.
In the matter
of
GILBURD.

(a) *Ante*, page 219.

1833.

—
Ex parte
 HANCOCK.
 In the matter
 of
 GILBARD.

asked that the costs of this petition might be ordered to be costs of the suit in equity, as was done in *ex parte Farden*, the petitioner being compelled to apply to this Court through the default of the bankrupt.

Per Curiam : — It is a settled rule, that when a party comes here for a favour he must always pay his own costs, and generally those of other parties in addition. In *ex parte Farden* it must have been agreed between the parties that the costs of the petition should be costs of the suit in equity.

Mr. *Bethell* for the assignees.

Ordered, that a claim for the 595*l.* 12*s.* be entered on behalf of the petitioners, and that a dividend on that sum be paid into the Court of Chancery, and invested in the name of the accountant general to the credit of the suit generally. This order to be entered with the registrar of that court, if it shall think fit. Each party to pay their own costs.

C. R.
 Dec. 14,
 1833.

Ex parte FULLER and another, assignees. — In the matter of FULLER.

If two proofs be made on a joint and several bond, against two separate estates, a subsequent consolidation of the estate does not effect the double proof. Costs given out of the

THOMAS FULLER senior, *Thomas Fuller* junior, and *William Fuller*, were partners. In 1825 *Thomas Fuller* senior and *Thomas Fuller* junior gave their joint and several bond for 1,803*l.* to *Markwick*. In April 1832 a fiat issued against the three *Fullers*. *Markwick* proved against the separate estates of *Thomas Fuller*

estate, because the commissioners held the case doubtful.

senior and *Thomas Fuller* the younger for 1,803*l.* on the bond.

The accounts being extremely confused, an order was made to consolidate the joint with the several separate estates.

At the subsequent dividend meeting *Markwick* claimed to be paid two dividends on his double proof, whereon the petitioners applied to the commissioners to expunge one of the proofs, on the ground of the consolidation; but the commissioners, thinking it a case of doubt, did not feel themselves authorized to expunge either proof, and entered their reasons on the proceedings in the form of a certificate, which, after stating the facts of the case, concluded as follows:—“The commissioners are of opinion, that at all events the case presents such a degree of doubt and difficulty, in point of law, as would render it improper to proceed to strike out or reduce a debt already admitted to proof; but that it should rather be left to an appeal to the Court, from the assignees, if they think proper; and therefore we declined proceeding farther upon the application.”

This was a petition praying to expunge the first proof, with costs.

Mr. Koe for the petition:—

If the estates had not been consolidated, *Markwick*, as the joint and separate creditor, would have been entitled to have proved the bond, either against the joint estate of the two, or against the separate estate of each; but he must have elected against which he would prove, and could not have proved against the joint estate of the two, and the separate estate of each. *Ex parte Bevan*, 9 *Ves.* 223, and 10 *Ves.* 107, on appeal. *Ex parte Husband*, 5 *Mad.* 421.

1833.

Ex parte
FULLER
and another.
In the matter
of
FULLER.

1833.

—
Ex parte
 FULLER
 and another.
 In the matter
 of
 FULLER.

But after the order made for the consolidation of the two estates he is no longer entitled to that election ; for, in effect, the separate estates of each being brought into one fund, he has the same benefit by one proof as he would have had if the estates had been kept distinct, and he had proved against each estate.

The plurality of proofs supposes a plurality of estates : only one sum is secured by the bond ; and though by virtue thereof that one sum is a charge on two estates, yet when those estates become consolidated, as there is but one estate, there is no more reason for doubling the proof, than the sum itself.

The effect of the order for consolidation has been, to convert the several separate estates into one joint fund. Such order was merely intended to furnish a more convenient mode of distributing the estates, and was not intended to place the petitioner in a better situation than he would have been in without the order.

Mr. *Swanston*, for the respondent, was stopped by the Court.

The CHIEF JUDGE : — An order for consolidation furnishes a more convenient mode of administering assets, and has no effect whatever upon proofs already made. It does not follow that the creditor will obtain a larger sum on his two proofs than he would without consolidation, as there may be so many joint creditors as to place him in a worse situation. There is no ground for this petition to expunge. As the commissioners doubted, both parties may take their costs out of the estate.

Sir *John Cross* : — This creditor, before consolidation, established clear rights of proof, which have not been affected by any thing done subsequently.

Sir *George Rose*:—The estates were so confused that it could not be ascertained which was joint and which was separate. To avoid litigation the order for consolidation was made; but that does not deprive the creditor of his rights.

1833.

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Ex parte
FULLER
and another.
In the matter
of
FULLER.

Petition dismissed. Costs of both parties out of the estate.

Ex parte TULL.—In the matter of DAVIS.

C. R.
Dec. 18,
1833.

WHEN this petition was called on, the petitioners did not appear.

It seems that
a party may
depose *vivd voce*
to having been
served.

Mr. *Montagu*, for the respondent, asked that it might be dismissed with costs. He stated that the respondent had not made an affidavit of having been served, but as he was in Court, probably he might be allowed to make the affidavit *instante*, or be sworn to the fact *vivd voce*.

THE COURT intimated an opinion that either course might be pursued. (a) The petition however stood over on other grounds.

(a) Hitherto the rule has been understood to be, that, to entitle a party to costs, when the other side did not appear, an office copy of the affidavit of service, or of having been served, must be produced before the rising of the Court on the day when the petition was called on. *Ex parte Astill, Buck*, 396, and *ex parte North, Buck*, 396, s. 4. *Madd.* 395. See *ex parte Palmer*, 1 *Dea.* & *Ch.* 490.

L. C.
March 22,
1834.

In cases of supersedeas the great seal has a substantive power, independent of that on appeal.

If, on a petition to supersede, the Lord Chancellor order a trial, which is in favour of the commission, the Court of Review cannot supersede on a petition for costs, and a cross petition for a new trial, brought on by way of further directions.

Ex parte KEYS and others.— In the matter of WILLIAM TERRY and JOHN TERRY.

THIS was a petition of appeal by the assignees and the solicitor to the commission, stating the following facts :

In September 1829 a commission issued against the bankrupts, and the petitioners were chosen assignees.

In November 1829 *Ann Harwood*, a creditor for about 100*l.* only, presented a petition to the Lord Chancellor, stating that the commission was concerted, and praying that it might be superseded.

This petition stated the circumstances by which it was alleged the concert was proved, and alleged that these circumstances were admitted by the petitioning creditor to *Hardy*, the solicitor to *Ann Harwood*, as well as to other persons. In support of this petition, affidavits were filed by one *Charles Hicks*, and also by *Hardy*, and *Edward Webb junior*, and by other persons.

The petition was heard before the Vice-Chancellor, in January 1830, when his Honor declined to decide on the evidence contained in the affidavits, and made an order, reciting that, upon hearing the said petition, and the affidavits filed in support thereof and in opposition thereto, and what was alleged by Mr. *Rose* (a) and Mr. *Montagu*, the counsel for the several respondents thereto, it was ordered that the said parties should proceed to a trial at law on the following issue ; viz. whether the commission issued against the bankrupts were a commission concerted between the petitioning creditor with the bankrupts or either of them ? In which issue *Ann Harwood* was to be the plaintiff, and the assignees defendants ; and that either party, as well plaintiff as defendant, should be at liberty to examine the bankrupts at the trial of the said issue, and also all or any of the

(a) Now Sir George Rose.

other persons whose affidavits had been filed. And his Honor reserved all further directions and costs till after the trial; and any of the parties were to be at liberty to apply to the Court.

This issue came on for trial at Taunton, on the 6th of April 1830, before Mr. Justice *Bosanquet*; when, in support of the plaintiff's case, Mr. *Erskine* (a) called *Charles Hicks*, and proposed to examine him as to a certain verbal admission alleged to have been made by one of the bankrupts after the issuing the commission, but which Mr. Justice *Bosanquet* refused to receive in evidence; whereon Mr. *Erskine* elected to be nonsuited.

On the 22d of April *Ann Harwood* presented another petition to the Lord Chancellor, stating the former proceedings, and praying that the assignees might be restrained from entering up judgment on the nonsuit, and that there might be a new trial. This petition was heard before the Vice-Chancellor in June 1830, and dismissed with costs.

Against this decision *Ann Harwood* presented a petition of appeal to the Lord Chancellor, which was argued on the 23d and 24th of August 1831, and the Judge's notes at the trial read; and his Lordship ordered, that, on the solicitor to *Ann Harwood* giving to the assignees his undertaking to be personally responsible to the assignees for the costs of the former trial and that application, a new trial of the issue directed by the Vice-Chancellor should be had; and that so much of the Vice-Chancellor's order as directed that the bankrupts should be examined should be varied, by directing, in lieu thereof, that the defendants should call the bankrupts on the trial, and should examine them on such trial, as also *Richard Elsee* the solicitor: and his Lordship confirmed the

1834.

Ex parte
KEYS
and others.
In the matter
of
TERRY
and another.

(a) Now Chief Judge of the Court of Review.

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Ex parte
 KEYS
 and others.
 In the matter
 of
 TERRY
 and another.

order of the Vice-Chancellor in all other respects, and reserved all costs, and gave liberty to either party to apply.

The new trial was had in Somerset, in August 1832, before Mr. Justice *Pattison*, when a verdict was given for the defendants (the assignees), the jury expressing themselves satisfied that the commission was not concerted; and Mr. Justice *Pattison* stating that he perfectly agreed with the jury. On this trial *Charles Hicks* was in court, but was not called as a witness. The petitioning creditor was called, but his evidence being as to conversations by him after issuing the commission, the counsel for the assignees objected that it could not be received in evidence under the form of the issue, and it was rejected by Mr. Justice *Pattison*.

No further proceedings being taken by *Ann Harwood*, the assignees presented a petition to the Court of Review, stating the above facts, and the undertaking to pay the costs, and praying that *Ann Harwood* and her solicitor might be ordered to pay the assignees their costs. This petition came on to be heard on the 22d of February 1833. On being opened, the Chief Judge inquired whether *Charles Hicks* had been examined at the last trial, and being informed that he had not been called, was pleased to state that he knew all the facts of the case, and that, in his opinion, justice could not be done unless the evidence of *Charles Hicks* were adduced. Whereon the counsel for *Ann Harwood* requested that the petition then before the Court might stand over, to enable her to present a petition for a new trial of the said issue. On which the counsel for the assignees objected, that *Ann Harwood* might have called *Charles Hicks*, who was in court at the trial, but had not thought fit to do so. The Court ordered the petition to stand over.

Ann Harwood then presented a petition to the Court of Review stating all the above facts, and praying a new trial, and that the record of the issue might be so varied that the intent of the Court of Review to ascertain all the facts might not be defeated; and that thereon the bankrupts, the petitioning creditor, and *Charles Hicks* might be examined.

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Ex parte
KEY
and others.
In the matter
of
TERRY
and another.

The two last-mentioned petitions were heard before the Court of Review on the 17th of April, and several following days; the notes of Mr. Justice *Pattison*, and the short-hand writer's notes of the evidence on both trials, were, by consent, put in and read. The Court postponed their judgment till the 1st of July 1833. Sir *George Rose* went fully through the affidavits filed in support of the original petition (of November 1829), and particularly an affidavit by *Hardy*, as to a statement made by the petitioning creditor to him after the issuing the commission; and also the affidavits of *Charles Hicks* and *Edward Webb junior*, as to circumstances therein deposed to, and stated to have occurred subsequent to the issuing the commission; and his Honor declared that no new trial or further inquiry was necessary, but that the commission ought to be superseded. His Honor, Sir *John Cross*, was of opinion that the Court ought to concur with the finding of the jury, and that the last petition of *Ann Harwood* ought to be dismissed with costs. His Honor, the Chief Judge, concurred with Sir *George Rose*. Whereon it was ordered, that the commission be superseded, and that the costs of and incidental to such supersedeas be paid by the bankrupts and the solicitor to the commission.

Against this decision the assignees and the solicitor presented a petition to the Lord Chancellor, stating the above facts, and further stating, that the petitioners were aggrieved by the order; that, under the circum-

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Ex parte
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stances of the Vice-Chancellor and the Lord Chancellor having refused to decide on the said petition without an issue, the Court of Review had no jurisdiction thus to supersede; and that the petitioners were also aggrieved, because in making such order their Honors relied on the affidavits filed by *Ann Harwood* in support of the original petition, and admitted the depositions thereby made of alleged facts and circumstances, which, inasmuch as the same were therein stated to have occurred after the issuing the commission, ought not to have been admitted in evidence for the purpose of superseding the commission; and, in particular, because their Honors relied on the affidavit of *Charles Hicks*, notwithstanding that *Ann Harwood* had abstained from calling the said *Charles Hicks* as a witness at the trial of the issue; that inasmuch as the Court of Review had no jurisdiction to make such order, the petitioners had been advised and submitted that the same ought to be appealed unto and heard before the Lord Chancellor on a petition of appeal, and not on a special case.

The prayer of the petition was as follows :

That your Lordship will order and direct that your petitioners may be at liberty to present their petition of appeal to your Lordship from the said order of the said Court of Review, dated the 1st of July 1833; and that your Lordship will be pleased to receive and answer, and be pleased to direct that your petitioners may be at liberty to serve this their present petition on the said *Ann Harwood*, and all other necessary parties, as a petition of appeal from the said last-mentioned order; and that thereupon all matters aforesaid may be reheard and reviewed by your Lordship; and that the said order made by the said Court of Review may be reversed; and that the prayer of the said petition presented by your petitioners on the 29th of January 1833 may be granted;

and that the petition presented by the said *Ann Harwood* to the said Court of Review on the 5th of March 1833 may be dismissed with costs; and that your Lordship will be pleased to declare that the said commission ought to be proceeded with; and that a writ of *procedendo* do issue; and that your petitioners may be at liberty to take all their costs of this application, and occasioned by the order of the said Court of Review, out of the estate, &c.

The *Solicitor General*, Mr. Knight, Mr. N. Ellison, Mr. Bethell, and Mr. Bacon, for different appellants.

Mr. Swanston and Mr. Montagu, for the respondents, objected, that this being a question of fact, viz. whether or not the commission were concerted? was not the subject of an appeal; which, by the 1 & 2 W. 4. c. 56. s. 3. (a), could only be on a matter of law or equity, or as to the refusal or rejection of evidence, *ex parte Hinton*, 2 Dea. & Ch. 407.

LORD CHANCELLOR :—How comes this matter to be brought before me on petition, instead of special case?

The *Solicitor General* :—In pursuance of your Lordship's order.

Mr. Swanston and Mr. Montagu :—That order was obtained *ex parte*.

(a) That all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as herein-after provided, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal of admission of evidence only; and in all cases of appeal to the Lord Chancellor by virtue of this Act such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct.

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Ex parte
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and others.
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of
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 and others.
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 of
 TERRY
 and another.

Mr. *Vizard* (a) here read the following minute from the Minute Book :—

“ Mr. *Vizard*, being in court when the order was made to set down this matter for hearing on petition instead of special case, made the following minute on the petition, and sent it back to counsel :—‘ Mr. *Vizard* (being in court) did not hear the Lord Chancellor’s attention called to the fact, that this was an appeal without a special case ; and his Lordship has desired that no appeal be answered without a special case, unless special circumstances are stated to him ;’ whereon Sir *Edward Sudgen* mentioned the matter again to the Lord Chancellor, referring to the above indorsement, and stated circumstances that induced the Lord Chancellor to hear the matter on petition.”

LORD CHANCELLOR :

That alters the case : but it is not to be understood that an appeal can be heard on petition instead of special case, unless attended with very special circumstances. The Act does not point out any circumstances by which the Lord Chancellor is enabled to guide his discretion in exercising his jurisdiction when he is asked to hear an appeal otherwise than on a special case. The difficulty in which this places both the court and the parties is evident from what has just occurred ; for the parties coming here on petition have been arrested *in limine*, and compelled to argue the question, whether or not, in fact, I did allow the hearing to be brought on by petition.

As concerns the case now before me, I might, if I saw it expedient, even now refuse to hear the appeal on petition, on the ground that the order *improvide emanavit*.

(a) The Lord Chancellor’s secretary of bankrupts.

The *Solicitor General* :—The order to hear on petition having been regularly obtained, the formal method of proceeding, if the other side objected, would have been to move, on notice, to quash the order for a hearing on petition.

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Ex parte
KEYS
and others.
In the matter
of
TERRY
and another.

Mr. *Swanston* and Mr. *Montagu* :—

This appeal being on matter of fact, and brought before the Court in an irregular form, the Court ought at once to refuse the hearing without imposing on the respondents the necessity of moving to rescind the order.

That the Lord Chancellor has power to hear any appeal in bankruptcy on petition is not denied; the obscurity which existed was how the Lord Chancellor's opinion was to be formed and regulated as to the propriety of hearing on petition?

That was cleared up by *ex parte Hinton*, 2 *Dea. & Ch.* 407. This order, however, was made *ex parte*, and the regular course was to give notice.

LORD CHANCELLOR :—

As to the objection to the form in which this case is brought before me, I am of opinion that it is now too late to take any objection; not because the order is made, all *ex parte* orders being *periculo petentis*. My reason for deciding that the respondents are too late in objecting, is, that they were on the 9th of November served with the order of this court for the hearing of this case on petition; and if they had any objection to that course of proceeding, they ought to have moved to discharge that order.

It appears to me that for the future it will be expedient to settle the practice on such occasions as follows :

Let the appellant apply *ex parte* to have the matter heard on petition, and let the respondent subsequently move to set the order aside, if improperly obtained. This

The order to
hear an appeal
on petition, is
ex parte.

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Ex parte
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 and others.
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course will often prevent the necessity of going twice through the same case.

Concerning the other point, viz. that this is a matter of fact, and not of law or equity or of evidence, the Act is imperative. The words "in such other way as to the Lord Chancellor may seem meet," are not added in order to enable this Court to hear any matter merely of fact on petition, but because it may occasionally occur that there may be such an involution of law and fact as to render it impossible to sever them. Such cases this Court will hear on petition. The question here is, whether this be a question of law or of fact? In order to come to a satisfactory decision on that question, I am obliged to hear this petition through.

The *Solicitor General*, Mr. Knight, Mr. N. Ellison, Mr. Bethell, and Mr. Bacon, for the appellants:—

1st. The Court of Review has disregarded an order made by the Vice-Chancellor, one confirming it made by the Lord Chancellor, and has treated them as nullities.

2dly. That Court superseded without any application being made to it so to do.

3dly. Such supersedeas was contrary to the Act of Parliament.

1st. The Court of Review passed over an order made by the Vice-Chancellor, one confirming it made by the Lord Chancellor, and treated them as nullities.

The question is, whether the Court of Review be to act as a court of appeal from the orders of the Lord Chancellor? Twice this Court decided that the only question was as to concert, and that the question should be tried by a jury; and that the point could not be decided on affidavits. These two decisions of the Vice-Chancellor and of the Lord Chancellor the Court of Review has treated as nullities. Under the issue directed

in this case the Court of Review would do no more than proceed to adjudge the matter of the case on the matters included in the issue, and could not make an order on a ground not touched by the verdict.

2dly. The Court of Review on a petition by one petitioner refused the application, and superseded the commission on a petition which did not ask or expect a supersedeas.

On this there is no necessity to make any observations. The petitions before the Court of Review were, one by the assignees praying the costs of the anterior proceedings, and a cross petition by *Ann Harwood* for a new trial; the Court, however, neither ordered the costs to be paid, nor the new trial to be had, but ordered the commission to be superseded.

3dly. The supersedeas was contrary to the statute.

Concert is the ground of the supersedeas; but it is enacted by the 1 & 2 W. 4. c. 56. s. 43. "that from and after the passing of this Act no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor or agent, or any of them, and the bankrupt, his solicitor or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented, and shall be now pending."

[LORD CHANCELLOR:—No doubt that a commission cannot now be superseded for concert, unless in a case which falls within the latter words of the clause, "save and except where any petition to supersede a commission shall have been already presented, and shall be now pending;" but I am of opinion this case does fall within those words, the first petition presented in this matter being ordered to stand over till after the trial,

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KEYS
and others.
In the matter
of
TERRY
and another

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Ex parte
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 In the matter
 of
 TERRY
 and another.

But that being the case, should it not have come on for further directions in this Court? (a) How came the petition before the Court of Review?

Mr. *Swanston*.—It was carried there by an order transferring it to that Court. (b) The same circumstance occurred in *ex parte Christie, Mont. & Bli.* 314.]

The absence of *Hicks* has been stated as furnishing one of the grounds for the supersedeas. But the bankrupt was called as a witness on the trial, and the other side might thereon have called *Hicks*, but neglected so to do; and yet the Court of Review partly founded its judgment on the absence of *Hicks*.

Mr. *Swanston* and Mr. *Montagu* for the respondents :—

The verdict was not binding on further directions: verdicts never are. The only object of an issue is to satisfy the conscience of the Court; and, on further directions, the Court reviews the whole evidence,—that which was originally before it, and that which was adduced at the trial of the issue. If the conscience of the Court be not satisfied with the result of an inquiry before a master, or of an issue tried before a jury, or even of the decision of a court of law on a case sent for its opinion, in any of these cases the finding will be overruled; *Utterson v. Vernon*, 3 *T. R.* 539; 4 *T. R.* 570; *Hampson v. Hampson*, 3 *Ves. & Bea.* 42. A very remarkable case is referred to by Lord *Hardwicke* in *Stace v. Mabbot*, 2 *Ves. sen.* 554, as having occurred before Lord *King*, where five successive verdicts were given in favour of the validity of a deed alleged to have been

(a) See *ex parte Langston*, titions now depending before the *Mont. & Bli.* 142. S.C. 1 *Dea.* Lord Chancellor in matters of bankruptcy may be set down for & *Ch.* 325.

(b) Court of Review, Jan. 16, 1832.—It is ordered, that all pe- upon motion for that purpose.

forged, notwithstanding which Lord *King*, overruling them all, ordered the deed to be cancelled, the verdicts not giving him satisfaction.

[LORD CHANCELLOR :—That is only done when the circumstances are such that the Court in effect declares it will adopt no verdict but a particular one; and in the case mentioned by Lord *Hardwicke*, it would have been better if Lord *King* had exercised the mental courage to have said so at once.]

The whole matter resolves itself into this point,—had the Court of Review jurisdiction to supersede? Of which no doubt can be entertained. Suppose that after the verdict the matter had come back to the Lord Chancellor, could he not have adjudicated in the face of the verdict? And when the matter is transferred to the Court of Review, have they less power?

[LORD CHANCELLOR :—No doubt as to the power; but it is a power not used unless under very strong circumstances, such as a miscarriage, &c. of the jury, or from matter collected from the bill, answer, and other pleadings, or other matters which were not before the jury. Generally speaking, and in cases not of difficulty, this Court does not ask the opinion of a jury, and then pass it by as a nullity.]

This petition is presented for the purpose of obtaining, through indirect means, the opinion of this Court on a matter of fact.

[LORD CHANCELLOR :—In this case the Court of Review said, we will give you more than you ask; and then retreating on the original petition, and standing thereon, and passing by the verdicts, that Court superseded. That they had a right to do so, is past all question. I will avail myself of this opportunity of declaring, that I have now heard enough to decide that this is a proper case to be brought before me on petition, and

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Ex parte
KEYS
and others.
In the matter
of
TERRY
and another.

1884.

Ex parte
KEYS
and others.
In the matter
of
TERRY
and another.

not on special case. It might have consumed weeks before both parties could have agreed on the facts, and have settled the special case; besides, all the Judge's notes on the trial must have been embodied. (a)]

This, therefore, is not a question proper for appeal, it being one of fact alone.

[LORD CHANCELLOR:—It has been stated, that the Court of Review went partly on the ground that *Hicks* was not examined. How is the fact? Because it would be a *non sequitur*, that because *Hicks* was not examined the commission should be superseded; that would rather be a reason for a new trial.]

When the petition for costs was presented, one of the Court asked whether *Hicks* was examined, and declared that, unless he was, costs should not be given. Thereon the petition stood over, and a new petition was presented by *Ann Harwood*, praying for a new trial. In the order for supersedeas, the fact that *Hicks* was not examined had no weight as against her, but rather against the petition, and the order of supersedeas does not rest on that.

This is a question of fact, viz. whether or not this were a concerted commission? and the disguise of law is thin and transparent. Even on the merits, if they could be considered, the judgment of the Court below must be confirmed.

The orders of the Lord Chancellor and of the Vice-Chancellor are not overruled, but furthered, by the Court of Review.

The *Solicitor General* in reply:—

After an issue had been ordered, at which parties were

(a) Might not the notes be referred to, as was done in *ex parte Christie, Mont. & Bl.* 547?

examined *vidæ voce*, the Court of Review had no right to fall back on the affidavits formerly filed.

[LORD CHANCELLOR:—May not the Court have said this, (which this Court might have done if the petition had remained here,) viz. though before the verdict a clear opinion could not be formed, on which account a trial was ordered; yet, after looking at the evidence adduced at the trial, we cannot but perceive that it would lead to a conclusion one way, though the jury, through some extraordinary hallucination, find a verdict the other way. In such a case might not the Court act on the evidence in the face of the verdict?]

One of the judges declared he decided on the ground of the non-examination of *Hicks*: but his evidence was inadmissible, and an appeal would lie on that ground. The Court of Review decided on the affidavit of *Hicks*; but his evidence was not admissible, being what a bankrupt says after his bankruptcy.

[LORD CHANCELLOR:—*Hicks* might have been produced to prove that the bankrupt had sworn to some conversations before the bankruptcy, which he had said otherwise to *Hicks* after the bankruptcy; this would go to discredit the bankrupt's testimony as to what he said before his bankruptcy, and would not be substantive evidence of what he said after his bankruptcy.]

By the 19th section of the new Act, the Court of Review has no jurisdiction to supersede; the power to do which remains vested in the Lord Chancellor. (a)

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and another.

(a) "And be it enacted, that it shall be lawful for the Lord Chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order that any fiat issued by virtue of this Act shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission, according to the existing laws and practice in bankruptcy." 1 & 2 W. 4. c. 56. s. 19.

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Mr. *Swanston*.—As to that, the Lord Chancellor has confirmed the order of supersedeas. (a)

Cur. ad vult.

LORD CHANCELLOR:—

It is clear that the words of the Act exclude appeals on matter of fact, and only allow an appeal on a matter of law or equity, or on the admission or refusal of evidence. (b) There may also be an appeal on matters of practice, which latter is not named in the Act, nor was that necessary, it being of course under the principles of appellate jurisdiction. I am inclined to consider that the Court of Review has made an order at variance with the previous orders of the Vice-Chancellor and of this Court. Nevertheless, my judgment does not turn on this, though it may influence my discretion as to interfering under the Act, “otherwise than on special case.” The Vice-Chancellor had refused a new trial: on an appeal from him, I ordered a new trial, which was had. My order was either perfectly or imperfectly executed. If perfectly, the verdict ought to have been satisfactory; if imperfectly, the prayer of the original petition ought not to have been granted. If the trial were unsatisfactory, a new trial should have been ordered; if satisfactory, the Court of Review could not order the supersedeas. It is not to be expected, generally speaking, that a court of equity should decide against a verdict; extreme cases may certainly exist where the Court would

(a) The Court of Review order the supersedeas absolutely, and not “if the Lord Chancellor shall think fit.”

The form used by the Lord Chancellor’s orders of confirmation is: “Upon reading the

above order, I do hereby confirm the same, and do direct that a writ of supersedeas issue accordingly.

Brougham, C.”

(b) See the clause, *ante*, page 231, note (a).

so decide, and I do not reverse the order of the Court of Review because I conceive that they have less power in that respect than a court of equity.

It is a material circumstance, that the Court of Review acted on an order originating in this Court; there being a distinction whether the order originated here or in the Court of Review. It originated here, and the further acts of the Court of Review should have been on the footing of the order of this Court, and not in opposition to or irreconcilable therewith. I do not, indeed, assert that they are irreconcilable, but it seems to me that such is the case. There seems reason to believe that the Court of Review proceeded on circumstances arising after the bankruptcy, and therefore not admissible in evidence (though I do not lay much stress on that); for any thing that I can discover, they superseded on circumstances not before the jury, not tried at the issue.

Mr. *Swanston* and Mr. *Montagu*, in a learned and ingenious line of argument, sought to show that the orders were reconcilable, and that the Court of Review proceeded on the evidence furnished by the new trial, and might have disregarded the verdict, and had a right to do so; and that matter might have been before the Court of Review, which, if it had been before this Court, would have induced it to supersede; and that, consequently, whether the Court of Review did right or wrong is a matter of fact, and not of law or equity, and not subject to appeal. And they argued that this Court formerly had the right to supersede when the petition was here; that the Court of Review had the same right when the petition was there; and that the Court of Review might have assumed that this Court would have superseded without further inquiry, which again would

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be a question of fact, not law. Such was the line of argument.

This is the strongest view against the competency of this appeal. But in deciding whether or not the order made in this Court has been departed from, I ought not to allow myself to be influenced by such nice calculations of possibilities and probabilities; I must look at the real state of circumstances.

There is another ground which calls on me to exercise an ampler discretion, and to look at this case under a wider range of view, without regard to the question whether this be a matter of law or of fact.

Under the Act, the Great Seal has reserved to it all power of annulling fiats in bankruptcy; consequently the Chancellor has full and ample power, without any qualification, of annulling a fiat, or of refusing so to do; the Great Seal is not restrained as to annulling fiats by any of the provisions of the 1 & 2 W. 4. c. 56. The Court of Review has, in fact, no power of itself to supersede; it indeed makes an order to that effect, but the Great Seal issues the supersedeas. The Great Seal issues the fiat; and the Great Seal supersedes the fiat; and therefore cannot be controlled in this matter by the section as to appeals. (a)

The Court of Review appears to me to have no power to supersede under the Act. The power of annulling fiats is not taken from the Great Seal; and with issuing fiats the Court of Review has nothing to do.

The section (b) does not convey away the power the Great Seal possessed, but gives a new mode of exercising it; and says, annulling a fiat shall have all the effects of the old supersedeas; and leaves every thing else just

(a) Section 3.

(b) Section 19, *ante*, page 239, note (a).

where it was; it leaves the Great Seal a substantive control in cases of supersedeas. This view of the case clearly entitles the Great Seal to entertain this question.

The order of the Court of Review must be reserved.

The last petition presented by *Ann Harwood* to the Court of Review, asks a new trial. It is not impossible but that a new trial may still be ordered by that Court.

Order reversed. The assignees to take their costs out of the estate. Costs of all other parties reserved.

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TURNER v. HIBBERT.

THIS was a bill filed by assignees of a bankrupt, which was dismissed with costs.

Sir *William Horne* and Mr. *Stinton* for the assignees, applied for their costs out of the bankrupt's estate.

Sir *Edward Sugden*, *contra* : — The Lord Chancellor has not jurisdiction, and a petition in bankruptcy ought to be presented.

The LORD CHANCELLOR said, he thought he had no longer jurisdiction, as the control over the bankrupt's estate was transferred to another jurisdiction, to which it would be necessary to apply (a).

L. C.
April 21,
1834.

If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained by the assignees out of the bankrupt's estate. — *But see the preceding case.*

(a) See *Bardwell's* case, *ante* 195, which appears *contra*.

C. of R.
April 14,
1834.

A supersedas
by consent
must have the
consent of all
the assignees of
a bankrupt
creditor.

In the matter of LEADER.

THE bankrupt petitioned to supersede with consent of creditors, having paid 10*s.* in the pound. The supersedeas was refused at the office on the following grounds:

1. James Adams, a creditor for 1*l.* 6*s.*, died insolvent, and had no personal representative: the consent was signed by a person who appeared connected with his affairs.

2. A creditor for 160*l.* 4*s.* 10*d.* had become bankrupt since his proof, and two assignees were chosen. The consent was signed only by one, the other being in France.

3. A debt had been proved by J. Marks as due to him and his late partner, M. Marks, both then being alive: a dissolution of the partnership had taken place, one of the terms whereof was, that J. Marks should receive the partnership debts. Subsequently to the proof J. Marks died, and his executrix had signed the consent. The rule required that the surviving partner should sign. (a)

Mr. Montagu applied.

Per Curiam:—We will allow the certificate to pass, notwithstanding the first and third objections. As to the second, the consent of all of several assignees is necessary (b); and one being in France is not a sufficient reason for dispensing with his signature.

(a) One partner may sign for himself and his co-partners, even though the partnership has been dissolved since the proof. *Ex parte Hall*, 1 Rose, 2. S. C.; 17 Ves. 62.

(b) One trustee cannot sign on behalf of himself and his co-trustee. *Ex parte Rigby*, 2 Rose, 224. But it seems one executor may. *Power v. Evans*, 5 Ves. 839. *Ex parte Rigby*, 2 Rose, 224.

Ex parte LAMPON.—In the matter of LAMPON.

L. C.

ON the 3d instant Mr. *Montagu* applied to the Lord Chancellor that a writ of *habeas corpus* might issue to bring up Charles Lampon, a bankrupt, who had been committed by the commissioners.

Private Room,
House of
Lords.

May 10,
1834.

If a bankrupt be examined before one commissioner, and committed to the custody of the messenger, and after a short time brought before two commissioners, who ask a few questions and commit him, the committal is bad.

LORD CHANCELLOR :

This being a case concerning the liberty of the subject, I will hear it without delay.

It was arranged that the prisoner should be brought up this day.

The warrant of committal was as follows :—

“ In the Court of Bankruptcy, the
21st day of March 1834.

“ Whereas a fiat in bankruptcy, bearing date the third day of February 1834, was awarded and issued and is now in prosecution against *Charles Lampon* of Tyers Gateway in the Parish of Saint Mary Magdalen, Bermondsey, in the County of Surrey, Fellmonger, Dealer, and Chapman, under which the said *Charles Lampon* hath been duly found and declared a bankrupt : And whereas at an examination of the said bankrupt, taken before us, *Joshua Evans* Esquire and *John Samuel Martin Fonblanque* Esquire, two of the commissioners of the said Court of Bankruptcy, the following answers to the questions put to him on oath were made by the said *Charles Lampon* as follows :—

“ At a meeting before *Joshua Evans* and *John Samuel Martin Fonblanque* Esquires, at the Court of Commissioners of Bankrupt, on the 21st day of March 1834.

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“ In the matter of *Charles Lampon*, a bankrupt.

“ *Charles Lampon* examined.

“ Q. What money did you receive on the 1st day of February last?—I tell you, as I told you before, I do not know what I received on that day; it was about 200*l*.

“ Q. What have you done with the money?—I have spent it nearly all in living and going about to places where I ought not to have gone; but I was driven away from home, for I knew if I had gone there I should have been arrested.

“ Q. How much money have you now left out of the two hundred pounds?—Not 5*l*.

“ Q. Do you mean to say you have spent all the 200*l*. except the 5*l*.?—I have; it is all gone, spent, or lost; it is all gone.

“ Q. Can you give any other account of the 200*l*. except this you have mentioned?—I cannot at present, as I am not prepared, as I told you before.

“ Q. Have you any further account to give?—I have not at present.

“ CHAS. LAMPON.

“ Now, we, the said commissioners, considering such answers to be wholly unsatisfactory to us, these are therefore to require and authorize you, immediately on the receipt hereof, to take into your custody the body of the said *Charles Lampon*, and him safely convey to His Majesty's prison of Newgate, and him there to deliver to the keeper of the said prison, who is hereby required and authorized, by virtue of the said fiat and of the statutes now in force concerning bankrupts, to receive the said *Charles Lampon* into his custody, and him safely keep and detain, without bail, until such time as he shall answer to our satisfaction the said questions. Given

under our hands and seals, this twenty-first day of
March one thousand eight hundred and thirty-four.

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LAMPON.

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of

LAMPON.

“ JOSHUA EVANS. (L.S.)

“ JOHN S. M. FONBLANQUE. (L.S.)

“ Commissioners.

“ To Thomas Hamber our messenger,
and his assistants, also to William
Wadham Cope the keeper of
His Majesty's gaol of Newgate,
or his deputy.”

The following affidavit was filed by the prisoner :—

“ That on the 21st March 1834 deponent attended at
the Court of Commissioners of Bankrupts for the pur-
pose of surrendering himself, and submitting himself to
be examined by *John Herman Merivale* Esquire, a com-
missioner of His Majesty's Court of Bankruptcy, acting
in the prosecution of a fiat in bankruptcy issued against
deponent, but said *John Herman Merivale* was not then
in attendance at the said Court.

“ That in consequence thereof he attended before
Joshua Evans Esquire, another of the commissioners of
the said Court, and surrendered himself under the said
fiat, and was duly sworn, and submitted himself to be
examined by the said last-named commissioner.

“ Saith, the 21st March being the forty-second day on
which he was required to finish his last examination under
the said fiat, he, deponent, not being then prepared so
to do, applied to the said Mr. Commissioner *Evans* to
grant him one month further time for that purpose ; but
the said commissioner refused any further time than a
fortnight from the 21st day of March, and also refused
to grant him, deponent, his protection from arrest, except
from day to day.

“ That after said commissioner had so determined,
Drew of Bermondsey Street, the solicitor for the

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assignees under the said fiat, requested to be at liberty to examine deponent.

“ That in consequence of such application, he was examined by and before the said *Joshua Evans* Esquire for a considerable time, and, as far as deponent believes, for the space of one hour at least.

“ That part of such examination was reduced into writing, and signed by him, this deponent.

“ That during such examination said *Joshua Evans* Esquire expressed himself dissatisfied with the answers of deponent, and several times threatened to commit him to prison.

“ That at the conclusion of such examination before the said *Joshua Evans* Esquire he did commit deponent to the custody of Mr. *Thomas Hamber*, one of the messengers of the said Court of Bankruptcy, and he, deponent, was removed to an adjoining room.

“ That after the lapse of a short time deponent was taken before the said *Joshua Evans* Esquire and *John Samuel Martin Fonblanque* Esquire, another of the commissioners of the said Court of Bankruptcy, before whom the examination of deponent was then continued; and after a short examination the said two commissioners, by a warrant under their hands and seals, committed deponent to His Majesty's prison of Newgate.”

Mr. *Russell*, in support of the commitment, objected to any affidavit being read.

Mr. *Swanston* and Mr. *Montagu* for the prisoner :—

When the prisoner's discharge depends on some fact not set out on the writ, but which ought to have appeared thereon, an affidavit stating that fact is admissible. In *Coomb's* case, 2 *Rose*, 398, Lord *Eldon* said, “ That there has been a subsequent examination is not disputed ;

to that fact, however, as a ground of discharge not arising upon the writ, there must be an affidavit." In *Power's* case, 2 *Russ.*, 584, the return did not set out the warrant, and Lord *Eldon* observed, "It would be a strong thing to say, that the merits of a committal are to be tried merely by the return of the writ, however erroneous that return may be; if such were to be the rule, then the person who makes the return to the writ would in fact by making a return short of the truth assume to himself a power of discharging a prisoner improperly committed." And on the next day his lordship said, "That it seemed very manifest in this case that the whole of the warrant was not set forth in the return; that the question might be put to the gaoler in court whether it was or was not fully set forth, or the whole of it might be set forth by an affidavit of those who opposed the prisoner's discharge."

In the present case the affidavit discloses an important fact, not apparent on the warrant; viz. that only one commissioner examined the prisoner, after which another commissioner was called in, and then the two committed the prisoner.

LORD CHANCELLOR:—Affidavits may certainly be read to show facts not apparent on the face of the warrant; otherwise there would be nothing to prevent commissioners from making up a warrant, stating the facts incorrectly, or altogether omitting them; and as London commissioners are judges of record, (1 & 2 W. 4. cap. 56. sec. 1.) they would not be liable to an action for so doing.

Mr. *Swanston* and Mr. *Montagu*:—

There are various objections to the warrant:

1st. The commissioners have not sufficiently examined,

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the prisoner to warrant this Court in saying that the examination is not satisfactory. (a)

2d. The bankrupt, after he had been examined and committed by one commissioner, was not brought up, in obedience to the direction of the statute, before a Subdivision Court.

3d. The examination refers to a former examination not set out on the warrant. (b)

4th. It does not appear on the warrant that the prisoner was committed by one commissioner to the custody of the messenger. (c)

(a) That it is incumbent on commissioners not to stop short in the inquiry, see *Norris's case*, 2 *Jac. & W.* 437; *Walker's case*, 1 *Gl. & J.* 371; in *Hooton's case*, 2 *Gl. & J.* 215; *ex parte Baxter*, 7 *Barn. & Cres.* 677; and *ex parte Fitzhenry*, 1 *Molloy*, 37; and surely the commissioners ought to exercise some of the vigilance of a counsel in cross examining a witness. In *Bardwell's case*, ante 207, the Lord Chancellor contemplates the situation of a party before this tribunal, saying, "I venture to express my own doubt, whether the question being as to the admissibility, in point of law, of a question put by a commissioner to a comparatively ignorant party, ignorant of law, no doubt, and who may be unprovided with counsel or even a solicitor at the time,—I venture to doubt how far," &c. And who can doubt the necessity of caution where a party is before a commissioner, unrestrained by the salutary check of professional and public observation. In many cases the courts have said that this great power of commitment ought to be construed strictly. *Ex parte Vogel*, 2 *Barn. & Ald.* 224, 228; *Nobes v. Mountain*, 3 *Brod. & Bing.* 236; *ex parte Bardwell*, ante 212; *ex parte Leeke*, 3 *Yo. & Jer.* 55; *D. Vaughan, B.*; *ex parte Isaacs*, *Mont. & Mac.* 27.

(b) As to the necessity of setting out the whole of the examinations, see *Coomb's case*, 2 *Rose*, 398; *Crowley's case*, *Buck.* 270; *Tomlin's case*, 1 *Gl. & J.* 375; *Price's case*, 2 *Gl. & J.* 215; *Hooton's case*, 2 *Gl. & J.* 217; *Atkinson's case*, 2 *Gl. & J.* 118; and see the Lord Chancellor's words in *Bardwell's case*, ante 203.

(c) Had this appeared on the warrant the objection to it would have been palpable.

5th. The conclusion of the warrant is defective. (a)

Bardwell's case, ante 193, was then produced, in which the Lord Chancellor says (p. 211), "It appears to me that the statute intended to give the party under examination the security of three judges being present, presiding over his examination, and forming their opinion upon hearing and seeing him answer the questions put." (b)

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(a) When there is a special authority to commit the words of the statute must be followed. *Bracy's case*, 1 Salk. 549; *Nobes v. Mountain*, 7 Moore, 47; *Bracy's case*, Comb. 391.

The special authority in this case is by the words of the statute, which authorize a commitment, if the party "shall not full answer make to the satisfaction of the commissioners or the major part of them." See 5 Geo. 2. c. 30. s. 16; and 6 Geo. 4. c. 16. s. 36, 155.

The practice has been to commit "till such time as he shall submit to us the said commissioners, or the major part of the commissioners, and full answer make to our or their satisfaction." *Müller's case*, 3 Wils. 420; *Nolan's case*, of which a correct copy was furnished by Lord Eldon in *Coomb's case* and *Brown's case*, 2 Rose, 405—407. See *Crowley's case*, Buck. 267.

The conclusion of the warrant in the present case (*ex parte Lamon*) is "to our satisfaction," so that the prisoner might remain in prison for life.

If the warrant were defective, would it be in substance or in form only? a question attended with difficulty. In the Exchequer all the judges thought it a mere formal objection, 3 Yo. & Jer. 55; but in the King's Bench the judges thought it a substantive objection, and discharged the bankrupt. See the Judgment of *Bayley, J.* in *ex parte Leake*, 9 Barn. & Cres. 257. See 6 Geo. 4. c. 16. s. 39; *ex parte Page*, 1 Barn. & Ald. 574; *ex parte Gee*, 6 Mad. 207; *Cassidy's case*, 19 Ves. 324.

(b) When he came to the bench he would never suffer his opinion in any case to be known till he was obliged to declare it judicially; and he concealed his opinion in great cases so carefully that the rest of the judges in the same court could never perceive it: his reason was, because every judge ought to give sentence according to his own persuasion and conscience, and not to be swayed by any respect or deference to another man's opinion. Life of Sir Matthew Hale, by Burnet, p. 110. Edition 1802.

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LORD CHANCELLOR : — As this warrant is signed by two commissioners only, I shall call on the other side to support it; and I wish counsel to confine themselves at present to that point. I must see the provisions of this act as to commitments by commissioners properly enforced. I took considerable pains with that portion of the act. Before I delivered my judgment in *Bardwell's* case I had some conversation with some of the commissioners. *Bardwell's* case, however, was stronger than the present.

Mr. *Russell*, in support of the warrant, contended —

First, any two commissioners have power to commit.

Second, If two have not, then there is no power of commitment under the act.

In *re Smith, Mont. & Bli.* 425, it was decided that two commissioners might commit.

Mr. *Montagu* : — I argued that case, and the question there was, not whether a Court constituted of two commissioners only could commit, but whether, the Court being constituted of three, the commitment were good, though only two actually concurred, and signed the warrant.

LORD CHANCELLOR : — There is nothing in *ex parte Smith* applicable to the present question.

Mr. *Russell* : —

The seventh section of the 1 & 2 W. 4. c. 56. enacts, “ That in every bankruptcy prosecuted in the said Court of Bankruptcy it shall and may be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by

any act or acts of parliament now in force vested in commissioners of bankrupts, in all respects as if they or any one or more of them were in every instance specially authorized and appointed for the purpose by a separate commission under the great seal of Great Britain."

If the clause had stopped there, one commissioner could have committed, the power of commitment being transferred from the 6 Geo. 4. c. 16. sect. 36.

But this seventh section goes on to deprive one of this power: "Provided always, that no single commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger or other officer of the said court, to be by him detained in his custody, and brought up before a Subdivision Court, or the Court of Review, within three days after such commitment, for which purpose one of such courts shall be forthwith assembled, and to which court such examination shall be adjourned."

LORD CHANCELLOR:—By the terms of that 7th section the single commissioner can only commit to the "custody of a messenger or other officer of the court;" and what is the messenger to do? He is to bring the bankrupt before a Subdivision Court within three days after such commitment. The single commissioner is only authorized to commit to the care and custody of the messenger; and if it be intended to commit to Newgate then a Subdivision Court must be summoned, which, by section 6 of the 1 & 2 W. 4. c. 56, must consist of three commissioners. I can perceive nothing in the act enabling two commissioners to commit to Newgate.

Mr. Russell:—The proviso of the 7th clause is, that no single commissioner shall have power to commit; that

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deprives any one of a power which otherwise he would have had, but does not deprive any two. If two commissioners cannot commit, then no power exists to commit, for no words will be found giving the Subdivision Court that authority.

LORD CHANCELLOR :—The words of the 7th section are, that the person in custody of the messenger is to be “brought up before a Subdivision Court within three days after such commitment, for which purpose one of such courts shall be forthwith assembled, and to which court such examination shall be adjourned;” does not this imply that the Subdivision Court is to proceed with the examination, and commit the party if he do not answer satisfactorily?

Mr. *Russell* :—

A power to commit cannot be given by implication any more than a power of condemning to death.

If it be held that only a Subdivision Court can commit, then, as it was held in *Bardwell's* case that it must go through all the examination, two or three such cases may occupy both Subdivision Courts for a week, and put an entire stop to all other business of the court.

The words of the act are, “Provided that no single commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger,” &c. In this case two commissioners examined the bankrupt, and the act only prevents one commissioner committing.

The LORD CHANCELLOR :—

I am of opinion, that though it might have been advisable to have added to the end of section 7 the words, “and the case proceeded on, and the prisoner

dealt with by such court," yet that such words are not necessary. The fair construction to be put on the act is, that one commissioner can only commit to the provisional custody of the messenger, and that the examination is then to be transferred and proceeded with by the Subdivision Court.

Section 7 enacts, that the prisoner shall be "brought up before a Subdivision Court." Section 6 lays down how a Subdivision Court is to be constituted, and that its purpose is "for hearing and determining the matters and things, and making the examinations herein-after referred to;" consequently section 7 comes in on the foot of section 6; and, considering the two together, the intent is clear that the Subdivision Court is to proceed with the examination, and commit if necessary.

This commitment, however, was by two commissioners; but I think a party about to be committed is entitled to have the benefit of three judges being present, even though all do not concur in the sentence of committal.

In election cases it is not necessary that all should concur in the election who are present, though it is necessary that all should be summoned: the cause of which is, that though they do not vote, their reasoning and arguments might have influence; even their presence might have some effect, for persons often will do that when alone which they would not when in the presence of others.

In this case there were but Mr. *Fonblanque* and Mr. *Evans* present; if Mr. *Holroyd* had been present, *non constat* but he might have suggested something which might have led to a different result.

The prisoner must be discharged.

Mr. *Swanston* and Mr. *Montagu* asked for costs, which were given in *Bardwell's* case, *ante* 193.

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LORD CHANCELLOR:—

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In *Bardwell's* case there were peculiar circumstances which induced me to give them. I shall not give them in this case.

The prisoner was discharged accordingly.

Whilst going down Westminster Hall, he was arrested for debt. Notice was given, before the officer had taken the prisoner from the hall, that it was a contempt, and that an application would be made to the Lord Chancellor to commit the officer, if, instead of bringing back the prisoner, he attempted to take him away.

Mr. *Montagu* applied to the Lord Chancellor, who was pleased to order the prisoner to be immediately discharged, and said, "It is a great contempt, and if he be molested in his way home I will commit every person concerned."

CASES

IN

BANKRUPTCY.

Ex parte MALACHY.—In the matter of BENNETTS and ROBINS.

C. of R.
January 7,
1834.

THIS was a motion made on behalf of *Malachy*, that he might be discharged from the custody of the warden of the Fleet, to which he had been committed by a warrant from this Court. (*a*)

When a prisoner will be discharged from an attachment for non-payment of money, the process being irregular.

A commission issued on the petition of *Malachy*.

In March 1832 *William Burnell*, *William Burnell* the younger, and *John Burnell*, partners, and *Henry Gilburd*, petitioned to supersede. In April 1832 *Malachy* moved that copies of certain documents be delivered to him, which was ordered, and that he should pay (*b*) the costs of such copies to *W. Burnell*, *W. Burnell* the younger, and *J. Burnell*, and *H. Gilburd*, and also the

(*a*) An application had previously been made before Mr. Justice Taunton, under a writ of habeas corpus, for the prisoner's discharge, who declined to interfere, as the committal was on process of contempt of a Court of Record.

(*b*) It will be observed, this order was to pay generally, no time being mentioned.

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costs of the said *W. Burnell*, *W. Burnell* the younger, and *J. Burnell*, and *H. Gilburd*, of appearing to such application; these costs were duly taxed at 9*l.* 15*s.* 8*d.*, and in June 1832 *Gilburd* served the order and certificate of taxation, and demanded payment. On the 17th of July the common order was made, that *Malachy* should pay to *W. Burnell*, *W. Burnell* the younger, *J. Burnell*, and *H. Gilburd*, within four days after demand, or stand committed. On the 22d of October *Gilburd* alone served this order, and demanded payment. On the 20th of November *Malachy* was ordered to stand committed for non-payment; a warrant issued the same day (*a*); and on the 26th of December *Malachy*

(*a*) Copy order of committal.

Wednesday, 20th Nov. 1833.

In the matter of *J. Bennetts* and *N. Roberts*, bankrupts.

WHEREAS *W. Burnell*, *W. Burnell* the younger, and *John Burnell* of, &c., grocers and copartners, and *Henry Gilburd* of, &c., have this day presented their petition in the above matter to this Court, praying that *J. Malachy*, the respondent in a certain petition presented to this Honourable Court by the petitioners above named, might stand committed to the custody of the warden of his Majesty's prison of the Fleet, and that a warrant of commitment might accordingly issue for that purpose.

Now, upon reading the said petition, and the affidavit of the said *Henry Gilburd* filed in support thereof, and also the former

order of this Court made in the above matter, and bearing date the 17th day of July 1832, this Court do order that the said *J. Malachy* do stand committed to his Majesty's prison of the Fleet, for his contempt in the said petition mentioned or referred to, and that a warrant do forthwith issue for that purpose.

By the Court.

J. F. Dep. Reg.

The above order is signed "by the Court." In *Airton v. Davis*, heard in the King's Bench on 27 April 1833, a question arose, whether the order of the Court of Review, substituting one petitioning creditor's debt for another, was proved by the initials of the deputy registrar and the words "by the Court." On an action against the sheriff an objection was taken to its not being

was arrested in Cornwall, and brought up to the Fleet prison.

William Rhodes, the clerk to the agents of the petitioner's attorney, deposed, that on the 16th of November he left the necessary documents with one of the deputy registrars, and requested the warrant of committal; that between the 16th and the 23d he called several times for the warrant, when the deputy registrar informed him it was not ready, he (the deputy registrar) not having had an opportunity of laying the proceedings or documents before the Judges, and procuring their authority for issuing the same; that he again called on the 23d of November, when the deputy registrar informed him that the sanction of the Judges had been obtained to issue a warrant, but that he (the deputy registrar) was directed to state that their Honors considered it a harsh measure to execute the warrant for so small a sum, as it would

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sealed; the Judge, however, refused to stop the trial, and reserved the objection. The case was afterwards argued in the King's Bench, and this point, among others, was made.

Serjeant *Wilde* and Serjeant *Coleridge* contended a seal was necessary, under the 28th section of 1 & 2 W. 4. c. 16, which enacts, that the Judges shall cause a seal to be made, "and shall cause to be sealed therewith all such proceedings, documents, and copies as by the law now in being, or by this act, or by any rule or order of the said Court, shall require to be so sealed." And they cited *Alves v. Bunbury*, 4 Camb. 28, and *Appleton v. Lord Braybrook*,

2 Stark. 6, and *Cavan v. Stuart*, 1 Stark. 525.

Serjeant *Jones* and Serjeant *Stephen*, *contra*.

Tindall, C. J.:—The objection, that the order of the Court of Review substituting one petitioning creditor's debt for another, is not proved by the initial letters of the registrar of the court, raises a question of a nice and difficult nature. I entertain a strong opinion on the subject, and when occasion requires I will not hesitate to express that opinion.

The other Judges delivered no opinion on the point, and the decision was on other grounds.

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create an additional expence to *Malachy* of about 30*l.* or 40*l.*

A clerk to the solicitor to *Malachy* deposed, that he believed that the affidavits on which the order issued were not filed till the day after the order issued, as the order bore date the 17th of July 1832, while, by the indorsement on the affidavits, it appeared they were not filed till the 18th; and that it appeared, by the book kept at the secretary of bankrupts office for the purpose of entering all affidavits filed, that the said affidavits were not filed till the 18th of July.

Mr. *Bethell* for the prisoner : —

The requisites in proceedings relating to commitments for the non-payment of money, costs, &c. are laid down in the books of practice as follows : —

“ In all cases personal service upon the party of the copy of any order for payment of money or costs, master’s certificate, &c., at the same time showing the originals.

“ Personal demand upon the party at the same time of the money, &c. ordered to be paid. The affidavit of the principal, if he personally made the demand, to state the above, and the non-payment of the money to himself or any person duly authorized on his behalf, and that the same is still due and unpaid.

“ If an attorney be substituted, a copy of the power of attorney is also to be served with and in the same manner as the before-mentioned documents; and the attorney to swear, in addition to the personal service and demand as before required, that payment of the money has not been made to himself or to his principal, as he hath been informed and verily believes, (or to the best of his knowledge and belief,) or to any other person on behalf of himself or his principal, and that the same is still due and unpaid.

" If the order be against two or more persons, and the process of commitment be pursued against one only, then the affidavit to state non-payment by either (naming the parties) to principal, or to any one duly authorized on his behalf, and that the same is still due and unpaid.

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" If the first order mention no time for payment (as fourteen days), but be ' forthwith,' then a reasonable time should elapse from the time of the demand to the time of presenting a petition for the four-day order. The practice has been one month, which is considered reasonable and proper, and is to be followed." 2 *Mont. & Gregg*. Dig. 162; *Eden*. B. L. Appen. 230.

In the present case the order is nominally that of the Court; in fact it is that of an officer of the Court; but I contend that it ought actually to have been made by the Court.

In *ex parte Davison*, 1 *Gl. & J.* 227, it was considered necessary to apply to the Court for the four-day order; and if in 1822 it was conceived that such an application should be made to the Court itself, that rule should certainly not be departed from now, when a separate court is established, which is constantly open to suitors.

Sir *John Cross*: — I do not believe any case can be produced where a four-day order was set aside, because not actually made by the Court.

The Registrar (a), at the desire of Sir *John Cross*, here stated, that the order is signed " by the Court;" that a short petition comes in to the office, stating the personal service of the order, the personal demand, and

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non-payment; this is supported by affidavit, and thereupon the next order issues of course. (a)

(a) On inquiry at the registrar's office, information has been kindly furnished that the practice is as follows:—

When part of the order made on a petition is to pay money "forthwith," and no specific time is mentioned, (which is seldom done in the first instance*), the person to receive the money must make a personal demand on the person who is to pay. If costs form the subject of demand, they must have been previously taxed, and Mr. Gregg's certificate of taxation obtained and filed. A copy of this certificate must be served at the time of demand, showing the original, or an office copy thereof, as the case may be. After this personal demand, the applicant must wait one month, a period established by custom, and recognized by practice. At the expiration of the month a short petition must be drawn, stating the facts, and praying an order for payment within four days, or committal, and the usual affidavit made of demand and non-payment in support, all which must be taken to the office, where an order to pay within four days will be given

of course. This order must be served personally, and a demand made. If the money remain unpaid at the expiration of the four days, another short petition, again stating the facts, and praying that a warrant of commitment may issue, and an affidavit in support, as before, must be taken into the office, whereupon an order will be made of course for the issuing of the warrant of commitment. This warrant issues under the seal of the court, and is directed to the warden of the Fleet or his deputies, and is sent from the office direct to the warden.

The above observations apply only when the order made in court is to pay "forthwith." If any specific time be mentioned, then the first application to the office is at the expiration of that time for the four-day order in the first instance, without the intermediate fourteen-day order.

The office, however, will only grant these orders of course under ordinary circumstances, and when every thing has proceeded in usual course. If there be any irregularity, or any unusual circumstances, then application must be made in open court. These applications have heretofore been *ex parte*; but it will be perceived by *ex parte*

* If any time be mentioned, it is usually fourteen days.

Mr. Bethell:—

The practice is, that unless a day be mentioned the party must wait a month, then obtain an order to pay within fourteen days or some other specific period, and next a four-day order; and it is only after both have been disregarded that the order for an attachment can issue; but in this case no "day" was mentioned, nor was the order made "forthwith."

In *Higgins v. ———*, 8 *Ves.* 381, Lord *Eldon* noticed the consequences of ordering money to be paid "forthwith," and mentioned an instance where an order in these terms was not acted on in five years.

In *Lamb v. Withers*, 1 *Young & Jervis*, 453, an order had been made, directing the payment "forthwith" by one of the parties of a sum of money to another of the parties. The order was served, and a demand of payment was made in the usual manner. A short order was then obtained for the payment of the money on a given day. That order was also served, and being disobeyed, a motion was made for an attachment for non-payment of the money, and a question arose whether the demand under the general or first order was sufficient, or whether a new demand was not necessary under the short order. The officers of the Court disagreed respecting the practice. The Court refused to order the attachment, considering that a demand ought to have been made under the short order, no time for the payment being fixed by the general or first order.

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Solomons, post 269, in note, that *Sir George Rose* is of opinion notice should be given.

Though it must be on petition, yet it does not appear that it is necessary to wait till it comes on

in its turn. It is presumed that the Court would allow it to be brought on at the sitting of the Court as if a mere motion, on giving two clear days' notice to the other side.

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In *Anon.*, 14 *Ves.* 207, Lord *Eldon* lays down the practice to be, that, first an order must be obtained that the party pay by a given day; and if he do not, then another order must be obtained, to pay by another day, or stand committed.

Another fatal objection to the arrest is the form of the order. It is necessary that the order should point out the person to whom the money should be paid, otherwise all must join in making the demand.

The application in this case was by *Gilburd* alone: that was insufficient. The four are not partners; therefore *Gilburd* was not authorized to receive the money.

In *Wilkins v. Stephens*, 19 *Ves.* 117, it was held, that, for the purpose of commitment under an order to pay money within four days, or stand committed, the person serving the order must have authority to receive the money; Lord *Eldon* saying, "If the person serving an authority of this sort have authority to receive the money, the other knows to whom he is to pay it; if not, he may be employed during the four days in hunting for the person who is to receive; and suppose his residence be in Cumberland? The person who is to pay must be placed in such circumstances, that the instant he is served with the order he may know how to deliver himself from it, and then his disobedience can be attributed only to his not being ready to pay."

Another objection is, that the affidavit of the money remaining unpaid was not made the day the warrant issued, but previously.

In *Carleton v. Smith*, 14 *Ves.* 180, it was held that a serjeant at arms was not grantable under a four-day order, to bring in books, &c., till made absolute by a subsequent order on the master's certificate, of the same date.

In *Hopkinson v. Leach*, 3 *Swanst.* 98, Lord *Eldon* held that the master's certificate that books, &c. had not been produced according to order, in order to support a motion for commitment, must bear date on the very day of the motion, otherwise *non constat* that the party had not since the certificate and before the motion obeyed, and protected himself from the commitment.

Passing by these objections, I question the power of this Court to issue the warrant under any circumstances. Formerly, when a party refused to obey the order of the Lord Chancellor, his Lordship, having no power to issue process to the ordinary officers appointed to execute the writs of the common law courts, was compelled, in each case, to constitute some person a special officer, *pro hac vice*, to arrest the offender under pretence of a contempt of court; and the warrants of commitment were to the warden of the Fleet and his deputies. This was one of those expensive and dilatory proceedings intended to be remedied by the new act (1 & 2 W. 4. c. 56.), of which the preamble declares, "That it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise touching the same, other than are provided" by the former statutes. The first section of the same act erects this into one of the courts of record at Westminster Hall; consequently this Court is no longer driven to act *in personam*, or compelled to have recourse to the doctrine of contempt. The consequence is, that this Court must pursue the course of the other courts of Westminster Hall. That course is to issue a writ of attachment to the sheriff of the proper county, who thereupon arrests the defaulter, and lodges him in the county gaol.

Instead, however, of issuing a writ to the sheriff, a

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special warrant issued to the warden of the Fleet, and *Malachy* was brought up to London at the expence of 40*l*.

Mr. *Swanston*, in support of the commitment :—

There is no distinction, except in words, between a general order to pay, and one to pay “forthwith.” The distinction recognized in the cases, is between an order to pay generally, and on a day certain. If *ex parte Davison*, 1 *Gl. & J.* 227, is depended on as laying down the practice, then that case is against this application : there the order was to pay “forthwith,” and the application was for the four-day order. And the Vice Chancellor, after referring to the secretary, made the order as prayed.

As to the filing, it is clear the affidavit must have been in the office when the order was drawn up, and any wrong indorsement cannot invalidate the commitment.

[*Sir John Cross* :—It does not appear that the demand was made by all, or by one with the authority of the whole.]

From the case of *Broomhead v. Smith*, 8 *Ves.* 357, it appears that the rule then was to issue an attachment at once, and it was sufficient if the affidavit were filed before the return of the order. In that case the attachment was objected to because the affidavit was not filed when it issued. Lord *Eldon* (who was assisted by the Master of the Rolls) decided on another ground. He said, however, “We are relieved, therefore, from deciding, in this case, whether the affidavit is necessary or not; a necessity which we are much disposed not to acknowledge, on account of the practice of the last fifty years against it, and the number of cases under process, liable

to the same objection, that would be affected by such a decision."

The Court in that case would not have discharged the order, but would have permitted other affidavits to be filed, which at any event I ask may be allowed in the present case, as the real state of circumstances is not in dispute; it is merely a technical question. The observations as to the propriety of issuing a writ to the sheriff only show the expediency of altering the existing practice, the jurisdiction of the Court to proceed in the present case by a warrant being perfectly clear. In fact we actually applied to the registrar to issue a process to the sheriff, but he stated that he had no authority.

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Sir *John Cross*: — The question of expence certainly strikes me. To execute this process so far off, and for so small a sum, does appear too strong-handed. The counsel, however, not having concluded their arguments, I will not say whether there has been any irregularity.

Mr. *Bethell* in reply: —

An order to pay generally is not equivalent to an order to pay "forthwith." In this order no hand was appointed to receive the costs, and where there are several persons, and only one makes the demand, it is nugatory; executors being the only class of persons of whom one can receive a sum and give a discharge.

A payment to one could not have been pleaded to an action by them all (a); so that *Malachy* refusing to pay

(a) Three graziers at a fair market, one of them returned, had left their money with their received the money, and ab-hostess while they went to the scolded: the other two sued the

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to one, was an act of prudence and not a contempt. Moreover, the order was drawn up before the original affidavit on which it was founded was filed.

[Sir John Cross :— The moment an affidavit is taken into the office, and comes into the hands of one of the registrars or their deputies, it is filed : there is no particular act constituting filing. (a)]

By an order of the Court of Chancery made in 1658, *Beame's Orders*, 148, it was specially ordered that no process of contempt should issue before an affidavit had been duly filed.

This order must be considered as if it had actually been made in Court. If the party had applied to the Court, he must have produced an office copy of the affidavit, and he ought to have done the same to the officer. If the registrar had been asked, "Is that affidavit filed?" he would have replied, "No; it is in the desk of one of the deputy registrars."

I therefore rest my case upon the following circumstances :—

1st. That the terms of *Gilburd's* affidavit do not bring *Malachy* into contempt; it only stating a demand by himself alone.

2d. That if it do, it was not filed when the order was made.

woman for delivering what she received from the three before they all came to demand it together. The cause was clearly against the woman, and judgment was ready to be pronounced, when Mr. Noy, as *amicus curiæ*, moved in arrest of judgment, that the defendant had received the money from the three together, and was not to deliver it until the same three demanded it; that the money was ready to be paid whenever the three men should demand it together: this altered the whole proceedings.

(a) In *ex parte Newton, 2 Rose*, 19, Lord Eldon says, "I have always understood the filing of an affidavit to be the swearing, and carrying it into the office."

3d. That it was sworn long before used, and therefore *non constat* but the sum had been paid since it was sworn.

4th. That the four-day order should not have issued without an intermediate order.

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Sir *John Cross*. — It appears to me that the just course is to order the discharge of the prisoner, without costs, if he pay the sum for non-payment of which he is in contempt, and undertake to bring no action. In this opinion I have ascertained that the Chief Judge concurs. It was a harsh course to issue this warrant, and had better have been avoided, unless absolutely necessary. I do not find that any intimation was made to him that the warrant would be issued if the money were not paid.

Discharge ordered. (a)

(a) Court of Review, 31 May 1833.
Ex parte SOLOMONS. — In the matter of MABERLY.

Mr. *Bethell* stated, that an order was made in this case to pay a sum of money within a week after personal demand; that the demand was properly made on the 23d of May, but the money not paid; he therefore moved for an order that the party might pay within four days or stand committed, and for the costs of this motion, and cited *ex parte Davidson*, 1 *Gl. & J.* 227, where it was held that after an order to pay forthwith, the next order was the four-day order.

The CHIEF JUDGE:—In this

case the order was to pay within a week after personal demand; the week only expired on the 29th, and this is the 31st. When an order is to pay "forthwith," in practice a month is always allowed to elapse before any further application is made. But the present application is on motion; that is not usual; the regular course is to present a petition, and though I do not say but that we may have power to issue the order asked on motion, yet where process of contempt, followed up to attachment, may ultimately issue, the more formal method of a petition appears advisable.

After an order to pay within a specified time, the next order is to pay within four days or stand committed: this is of course at the office, but if circumstances render an application to the Court necessary, notice must be given to the other side.

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A. gives an accommodation bill to B., which B. gives to C. in exchange for an accommodation bill given by C. to B. A.'s bill is proveable by the assignees of C. against the estate of A., but the dividend reserved.

Ex parte SOLARTE and others, Assignees of Alzedo.
— In the matter of DYER and SWAYNE.

THIS was an application to prove before Mr. Commissioner *Merivale*, who adjourned the question to the Subdivision Court, in pursuance of the 1 & 2 W. 4. c. 56. s. 30.

Mr. *Montagu* for the proof.

Mr. *Ching*, *contra*.

This day the judgment of the Subdivision Court was delivered by Mr. Commissioner *Merivale*.

In this case three distinct firms are concerned : —

1. *Knowles* and Son.
2. *Dyer* and *Swayne*.
3. *Alzedo* and Co.

Knowles and Son and *Dyer* and *Swayne* exchanged accommodation acceptances, mutually drawn and accepted by the two firms.

Alzedo and Co. accepted accommodation bills drawn by *Knowles* and Son, in exchange for some of the bills drawn by *Knowles* and Son, and accepted by *Dyer* and

Sir *George Rose* :—Such applications as the present need not be made to the Court ; but if any unusual circumstance should render an application necessary, then the better course will be to serve the other side, and not proceed *ex parte*.

Motion dismissed.

June 3.—This day Mr. *Bethell* stated to the Court that he found on inquiry, that the four-day order was of course at the office whenever money remains unpaid, after a special time has been appointed in an order for its payment.

Swayne, and delivered to *Alzedo* and Co. by *Knowles* and Son.

Each of the three firms became bankrupt, and none of the bills were due at the time of the bankruptcies.

On some of these bills accepted by *Dyer* and *Swayne*, and which were in the hands of *Alzedo* and Co. at their bankruptcy, the assignees (of *Alzedo* and Co.) seek to prove against the estate of *Dyer* and *Swayne*.

The bills between *Knowles* and Son and *Dyer* and *Swayne* (according to a principle established by Lord *Roslyn* in *ex parte Walker*, 4 Ves. 373, and ever since followed,) do not constitute a debt proveable on either side; but although mere accommodation bills, it is clear, that, in the hands of *bonâ fide* holders for valuable consideration, they are proveable against both estates, and this even though such holders had notice of the nature of the dealings between the two houses.

The right of the assignees of *Alzedo* to prove, depends on whether the acceptances given by *Alzedo* in exchange for the bills drawn by *Knowles* and Son, and accepted by *Dyer* and *Swayne*, furnished a valuable consideration.

It is a principle well established, that if a bill of exchange be given expressly in consideration of another bill, and in exchange for it, as was the case here, there is a good consideration, and the holders may prove against the party giving the bill.

The cases in support of this position are collected in *Bayley* on Bills, page 423 to page 430, edit. 5th; and it would be a waste of time, and imply a doubt where none exists, to analyze these cases, or inquire into the principles on which they were originally founded.

The assignees of *Dyer* and *Swayne* do not dispute the general principle, but contend that bankruptcy, having intervened before the acceptances became due, creates a distinction, and that there is no debt prove-

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able, because no money had actually passed from the acceptor of the counter securities at the time of his bankruptcy. But we apprehend that this cannot be supported consistently with the doctrine that these counter securities, by creating the liability to pay, do of themselves constitute a valuable consideration. Nor is the view contended for consistent with the fact that the bills have been negotiated for value, and thus a benefit has been actually enjoyed by those to whom they were given in exchange for *Dyer* and *Swayne's* acceptances.

Mutual acceptances constitute a debt proveable, although no money have passed between the exchanging parties, *Rolfe v. Caslon*, 2 *Hen. Bl.* 574; and the former practice in bankruptcy, as is stated by *Bayley* on Bills, page 425, was in strict conformity with this doctrine; the distinction (which appears to have been introduced by Lord *Thurlow* in *ex parte Clanricarde*, *Cooke's B. L.* 160, except as varied under the special circumstances of the dealing of a banker by Lord *Eldon* in *ex parte Bloxam*, 8 *Ves.* 531,) being, that a party who has actually advanced money, is entitled to receive a dividend immediately, while one who has only given bill in exchange for bill, though he is admitted to prove, is not entitled to receive dividends till he have either taken up his own acceptances, or until the account has been finally settled. The case of *ex parte Bloxam*, 8 *Ves.* 531, is an authority that the law is the same, whether the consideration be the acceptance of the person to whom the bill is transferred or that of any other person. With the principles of the foregoing cases that of *Sarrat v. Austin*, 4 *Taunt.* 200, is not at variance. It was there held, that money payable on a counter security is not a good petitioning creditor's debt, unless he have taken up his own acceptances; the reason of which is, as was

observed by Sir *J. Mansfield*, that a debt in its nature contingent will not support a commission. It would be a singular construction of those acts, that though a man, at the time of taking out a commission, be not entitled to receive a shilling out of the bankrupt's estate, nor ever will receive a shilling, unless he pay his counter bill, he shall be able to petition for a commission. But this reasoning was held wholly inapplicable to the right to prove merely, retaining the dividend, as is manifest from what was said in the same case: "This debt is not on the face of the instrument contingent, but it is thus far in the nature of the transaction contingent, that till the drawer has paid his counter bill the Court of Chancery will restrain him from receiving any dividend." The right to prove under such circumstances is one which, at law, would be unquestionable, although restrained in equity, in the mode already mentioned.

It has been urged, that this case is virtually governed by *ex parte Solarte*, 2 *Dea. & Ch.* 261, where the Court of Review decided, that the acceptances on which it is now sought to prove against the estate of the acceptors were not proveable in the hands of the same holders against the estate of the drawers; but we conceive that case is clearly distinguishable from the present, on grounds which, though not marked with sufficient precision in the printed report, yet may be collected from the facts as there stated; and that the distinction thus furnished was taken by the Court may be found by referring to the shorthand writer's note of what was actually said by his Honor Sir *George Rose*, who pronounced an elaborate judgment, the principal points of which are either unnoticed or only hinted at in the printed compendium of the case. By the shorthand writer's note it appears that the way in which Sir *George Rose* put the case was

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as follows:— Admitting that *Alzedo*, putting bankruptcy out of the question, would have had good cause of action against *Knowles* and Son, they, (*Knowles* and Son,) on the other side, might have obtained an injunction in restraint of such action, on a bill representing that there was no other consideration for their acceptances but *Alzedo's* unpaid and outstanding acceptances; and that he (*Alzedo*) not being in a state to provide for those acceptances, they (*Knowles* and Son) would have had to take up both their own and *Alzedo's* acceptances; and that though *Alzedo* were to allege, as a ground for dissolving the injunction, that he (*Alzedo*) had paid a dividend of near 12*s.* in the pound on his own acceptances, yet this would give him no right as against *Knowles* and Son, unless he could either deliver up the bills to them, or otherwise relieve them from all liability in respect to those bills. In the present case, the estate of *Knowles* and Son has actually sustained the burthen of proof, and has paid dividends, amounting to upwards of 5*s.* in the pound, on the acceptances of *Alzedo*; whence it follows, that if *Alzedo* were admitted to prove in respect of *Dyer* and *Swayne's* acceptances, taken by him in exchange for his own, there would be a double proof. This, while it strictly applies to the situation of *Knowles* and Son, the drawers, has no application to that of *Dyer* and *Swayne*, the acceptors of the bills now sought to be proved against the estate of the latter.

Now this, though very obscurely intimated in the printed report of *ex parte Solarte*, 2 *Dea.* & *Ch.* 261, appears to be the true ground on which the decision rested, which renders it unnecessary that we should look further into the report of that case, except in order to point out an inaccuracy which renders the report of no authority with respect to the grounds of the decision.

Sir *George Rose* is made to say, in general terms, and without any qualification, that if the bills "would not constitute a good petitioning creditor's debt, so neither are they proveable under a commission;" a position which, thus broadly stated, is not maintainable. (a) But this part of the report is at variance with the shorthand writer's note, by which his Honor appears to have said, "It is certainly a general rule, scarcely with more than one exception, that, in matters of legal debt, proveable debt and petitioning creditor's debt are convertible terms;" to which his Honor adds, "If the debt will not do as a petitioning creditor's debt, it will not, if a legal debt, do as a debt to be proved;" a most important qualification, altogether overlooked by the reporters, and which lets in the distinction of *Sarratt v. Austin*, 4 *Taunt.* 200, that a debt of this nature, though strictly proveable, is not a debt which will support a commission. Thus also it is in the same case stated as a ground of their Honors' decision in admitting the proof in respect of two bills (distinct from either of those now in question), that "although no notice of dishonour was given, yet as they fell due after the bankruptcy of Messrs. *Knowles* no notice was requisite," it is impossible to doubt that this statement must also have arisen from some inadvertance on the part of the reporters, being, thus broadly taken, at variance with the law as established in *Rohde v. Proctor*, 4 *Barn. & Cres.* 517, and ever since acted on, that although a party entitled to notice have become bankrupt, that does not dispense with the necessity of notice, either to the bankrupt himself or to his assignees, if assignees have been chosen. But this is an error which, as it does not affect the present question, we should not have

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(a) *Quære*. Does not the preceding sentence of Sir *George Rose's* judgment confine his observation to the particular bills in question?

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adverted to, except for the purpose of showing how little reliance is to be placed on this case of *ex parte Solarte*, thus loosely reported, as an authority, even if it were at variance (which it is not) with the principles on which we conceive the present case must be decided.

A distinction has been attempted to be established as to one of the bills for 293*l.*, which was an acceptance of *Dyer* and *Swayne*, given to *Alzedo* in exchange for an acceptance of *Alzedo's* to the same amount, indorsed by *Dyer* and *Swayne*, on which last acceptance Messrs. *Grote* and *Prescott* (the holders) have received dividends on all the estates to the amount of 20*s.* in the pound; and it is contended on the part of the assignees of *Dyer* and *Swayne*, that this bill having been proved against their estate, and they having paid dividends to *Grote* and *Prescott* on its amount, and as the bill is now in their possession, they are entitled to set it off against the cross bills accepted by *Dyer* and *Swayne*, which is one of those now sought to be proved by the assignees of *Alzedo*.

On the principle, however, which we conceive ought to govern the present case, which is to be found in *ex parte Clanricarde*, Cooke's B. L. 160, S. C. *Bayley* on Bills, 425, and the cases which have followed that decision, it will not be necessary to make any special order respecting this bill for 293*l.*

The order which we think it right to make is that the assignees of *Alzedo* be admitted to prove on all the acceptances of *Dyer* and *Swayne* in their hands, retaining the dividends until further directions, after it shall have been ascertained what each estate, including that of *Knowles* and Son, shall have paid on the whole of their mutual liabilities; and, to guard against any objection on the ground of an indefinite suspension of payment, let any party be at liberty to apply whenever it shall be probable that this account may be finally settled.

Ex parte DE BEGNIS and others.—In the matter of
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LAPORTE, being tenant of the King's Theatre or Italian Opera House in the Haymarket, London, under a lease from the assignees, at a rent of 13,250*l.* in August 1833, petitioned the Court of Review for a reference to Mr. Commissioner *Holroyd*, whether it would not be beneficial to the estate and the interests of the theatre that an abatement of the rent should be made, which reference was ordered. The commissioner, after examining witnesses, made the following certificate: "I hereby certify, that, in my opinion, it would be beneficial to the estate of the said bankrupt that the rent of the theatre, referred to in the said petition, for the first season and for the residue of the petitioner's lease, should be reduced to the sum of 10,000*l.* per annum, provided the petitioner can procure good security for the payment of such rent to the assignees. During this inquiry it was stated to me by a solicitor, that a client of his would give 11,000*l.* per annum for the theatre, with good security for the payment of the rent; but, from the evidence adduced before me with relation to the management of the theatre from the year 1828 to 1833 inclusive, and the receipts and expenditure during that period, it does not appear to me that a higher rent than 10,000*l.* per annum will afford a fair remunerating profit to a lessee, after paying all expences. Had the rent been 10,000*l.* per annum in 1828, 1829, 1830, and 1831, the average annual profit to the lessee, after paying all costs, would have been about 2,100*l.* Dated this 12th day of September 1833. *Edward Holroyd.*"

On the application of a tenant of the assignees a reference was made to the commissioner, who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the Court refused to interfere.

Laporte petitioned to confirm this report. The petition was heard on the 21st of November 1833, the

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assignees appearing, and not opposing, whereupon the Court made an order in effect confirming the report, and referring to Mr. *Gregg*, one of the deputy registrars, to settle the terms of the new lease, if the parties differed about the same, with liberty for either party to apply. On the 22d of November, on the application of the present petitioners, the drawing up of this order was suspended.

This was a petition praying that the proceedings already had should be rescinded, the certificate declared defective and erroneous, and discharged or rescinded, or that it might be referred back, and that in the mean time the order should not be drawn up.

Mr. *Temple* and Mr. *O. Anderdon*, for the petition, contended that the order ought to be discharged with costs, having been improperly and collusively obtained.

Mr. *Swanston* and Mr. *Montagu*, for the assignees of *Chambers*, said that the amount of rent offered was not the only point for consideration, one very material circumstance being the permanent good or bad effect which the management of the tenant may produce; it being obvious that it might be most injurious to accept a large offer from a man wholly unacquainted with theatrical management, the ultimate effect of which would be the ruin of the concern. If the assignees have misconducted themselves in assenting to the reduction of rent, the proper course is to petition to charge them with what, without their wilful default, they might have received.

Mr. *Twiss* and Mr. *Keen*, for *Laporte* the tenant.

The CHIEF JUDGE:—

The order complained of is, as it affects the interests of the applicants, mere waste paper. I made the ori-

ginal order reluctantly, knowing that, if the assignees were wrong, the report, though confirmed, would be no justification or protection, and that, if right, they might confidently proceed without the order of this Court; but it was urged, that it would at least furnish evidence of their good intentions, and even enable creditors to come forward, if there were any objections; and, finally, the order was made on importunity. The whole amounts to no more than an application to reduce rent made by the tenant, the assignees consenting, and the Court confirming. The only use, therefore, of the order is to prove that the assignees acted openly.

The same reasons which would have led me to refuse the order originally now induce me to refuse this application to annul it. At the present moment that order has no effect on the rights of the petitioners to call the assignees to account; but I am apprehensive that if the Court made any order on their petition, they would be so bound thereby as to be deprived of their remedies.

The Court might also refuse to interfere on the present occasion, quite independently of the merits, and on the simple ground of this being an application to rescind or vary an order made by persons not bound by it, nor parties to it, and which is yet in minutes.

I wish it to be distinctly understood, that the ground of my refusal to accede to the present application is, that by so doing some confirmatory force might, as against the present applicants, be given to an order which ought not to be so confirmed.

This petition must be dismissed, but, the Court not being unanimous, without costs.

Sir John Cross:—I hope that nothing I say will injure the assignees, or tend to impeach the uprightness

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The Court will not vary the minutes of an order on the application of persons not parties to, or bound by it.

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of their motives. It has been urged, that we ought to refuse to interfere to discharge the order in question, because, in a case before Lord *Eldon*, he declined to act on the application of a lessee. I continually hear cases which different Chancellors have refused to hear cited to induce this Court to refuse to interfere on similar occasions; but it by no means follows that because Lord Chancellors sitting in a court overburthened with business readily admit reasons for avoiding to hear causes, that this tribunal, which is not so overloaded, should decline to entertain petitions. It has been said, we need not vary this order, because it is of no validity. I do not wish to hear the orders of any Court treated as nullities. This Court ordered an inquiry, whereupon a report was made and confirmed; and why? for what was all this done? for the benefit of the creditors. But the report is, that *De Begnis* offers 11,000*l.* with security; and the reason given for not approving of the offer is, that the lessee could not receive enough profit if he paid 11,000*l.* If that reason be valid this conclusion must be arrived at, that, if *Laporte* himself were now to offer to pay 11,000*l.*, the assignees ought to refuse to receive more than 10,000*l.* When the Court confirmed the order it was done as a matter of course, there being no opposition. It is now, however, opposed, and the question arises, Have the petitioners any *locus standi in curia*? In my opinion they undoubtedly have; they are the *cestuis que trust* of the assignees, and state that the certificate, if acted on, will induce results highly injurious to their interests. I therefore regret that I cannot concur in the opinion that they have no such interests as to entitle them to the prayer of their petition.

Sir *George Rose*: —

This is a very simple case. The assignees have let

certain property at a given rent, and have reason to think that it should be reduced. The proceedings subsequent to the petition of *Laporte* do not alter or vary their original position, either as affects their rights or liabilities; neither the reference to the commissioner, nor the confirmation of his report by the Court, shields them from any responsibility, if they have not properly managed and dealt with the estate. They have taken on themselves to reduce the rent to 10,000*l.*, and the order of this Court is merely to be taken as a circumstance evincing their intent to act properly in so doing. The only question can be, Have they as trustees acted properly in so doing?

Putting the case most strongly for the petitioners, — suppose the commissioner had reported that a lease ought to be executed to *De Begnis*, if the assignees thought otherwise, we should have no authority to compel them to do so. It is true the Court often interferes where its orders cannot be considered as judicial, and are not binding on all parties. (a) Such orders are usually concerning the administration of assets. Suppose we were to refer this back to the commissioner, and he found that *De Begnis* ought to have been lessee, what authority should we have to order the assignees to accept him as their tenant, if they were reluctant? The order made merely gives confidence to the assignees; it confers no right on any person, nor does it deprive any person of any right.

The only method which the petitioners could pursue in this case (supposing the assignees to have acted unadvisedly) would be to petition for their removal, or to charge them on the ground of gross dereliction of duty. On such a petition how would the facts be? That *De*

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(a) See 2 *Christian*, B. L. 6, edit. 2d.

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Begniss offers 11,000*l.*; this by itself amounts to nothing, as it may be more advantageous to the estate to let to one man for 10,000*l.* than to another for 12,000*l.*, in these cases money not being the only test: would this be enough to enable the Court to remove the assignees? The parties here, however, ask to rescind the order, which they are not entitled to do, as it only protects the assignees from the imputation of improper motives, and gives them no right, and deprives no creditor of any right he may have as against them.

Petition dismissed. The assignees' costs out of the estate.

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Ex parte GORDON.—In the matter of MABERLY.

Under a fiat against a banker, one person allowed to prove on behalf of a large number of holders of 1*l.* notes; not interfering as to the assignees or the certificate.

MR. MONTAGU applied for an order, that one person might prove on behalf of a large number of creditors, being holders of 1*l.* notes; he not interfering in the choice of assignees, or with the certificate. And he stated the case of the *Portsmouth Bank*, cited in *ex parte Rogers, Buck*, 490, and said a similar order had been made under the bankruptcy of *Fauntleroy*.

Ordered.

Ex parte J. DAVY and W. LEE, assignees, &c. and C. of R.
H. MUNN.—In the matter of CHAMBERS, Jan. 14 & 16,
GRAINGER, and CHAMBERS. 1834.

IN 1812 a joint commission issued against the bankrupts. The two *Chambers* both died some time previous to this petition, having obtained their certificates.

In November 1812 *Grainger* petitioned that the time for his surrender might be enlarged, which was ordered; but he failed to surrender at the appointed time; whereon a warrant issued for his apprehension, but he absconded. In 1819 he petitioned for a meeting for his surrender, which was ordered, the assignees consenting. He surrendered accordingly, and after several adjournments of his examination he was committed for gross prevarication; he remained in prison till 1823, when the commissioners ordered his discharge, on the ground that his mind was unsound.

In 1813, or 1814, the assignees brought an action against a creditor, who took them by surprise in disputing the validity of the commission, and the verdict was against them; a new trial was moved for, but it did not appear what the result was.

In 1824 *Grainger* commenced an action of trover against Mr. *George*, for a box delivered by *Grainger* to him, on purpose to try an action to disturb the commission. *George* delivered the box over to the assignees, who defended the action, and pleaded the statute of limitations, and *Grainger* was non-suited. The box contained old clothes, and papers of no value.

In 1825 the assignees sold parts of *Grainger's* real estates, and in 1828 they sold other portions. At the latter sale Mr. *Munn* was a purchaser.

The Court have jurisdiction to restrain the bankrupt from bringing actions to upset his commission.

After twenty-two years, and acquiescence, the Court will restrain the bankrupt from bringing actions against purchasers under the commission.

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In 1832 *Grainger* commenced an action of ejectment against a lessee of *Munn's*, and he also commenced other eleven different actions of ejectment against different purchasers from the assignees.

In September 1832 *Grainger* petitioned to supersede, and his petition was dismissed, with costs to be paid by him personally. *Grainger* had not obtained his certificate.

The petition prayed, that *Grainger* might be restrained from further disputing the validity of the commission, or proceeding at law for that purpose, and that all actions now pending having that object in view might be stayed; and also that *Grainger* might join in and confirm the conveyances made by the assignees.

Mr. *Bethell*, for the petitioner, after stating the facts of the case, was stopped by the Court.

Mr. *Swanston* and Mr. *Russell* for the bankrupt:—

First, it is submitted, that the Court of Review has no jurisdiction to make the order prayed.

The jurisdiction now asked can only be exercised by a court of equity, and on a bill filed. Though instances may be found in which the Lord Chancellor, sitting in bankruptcy, occasionally granted such injunctions on petition, yet such jurisdiction was exercised as Lord Chancellor. (a) The Lord Chancellor, therefore, bringing his powers as an equity judge to the assistance of those he possessed when sitting in bankruptcy, exercised jurisdiction in many instances in which this Court cannot, being a tribunal sitting in bankruptcy only.

The Lord Chancellor having the power, either as Lord Chancellor or as sitting in bankruptcy, might

(a) See *ex parte Warwick, Buck*, 527.

declare, "I think fit to exercise that power on petition alone, which I undoubtedly may exercise on bill." But the jurisdiction of this Court is limited by bankruptcy, and no application can be made on bill, and consequently the injunction cannot issue from this Court.

In *Flower v. Herbert*, 2 Ves. sen. 326 (a), an application for an injunction was made on a bill filed. In *Kirkpatrick v. Dennett*, 1 Sim. & Stu. 408, S. C. 1 Gl. & J. 300, the application was by bill, and though a demurrer was allowed it was on another ground.

[Sir G. Rose:—It certainly appears by the early cases, that restraining the bankrupt from bringing actions was formerly thought a circumstance of equity which could only be obtained by bill, but in subsequent cases it was ordered on petition; and reference to first principles shows it may be done on petition. Where the committees of lunatics are interfered with, where trespasses are committed on property to which a receiver is appointed, or on that held by any other officer of a court under a sequestration, the Court always interferes to protect its officers on petition; and the protection demanded in those cases is analogous to that now asked by the assignees, who are officers of this Court.]

In all the cases referred to there was a preceding decree which bound all parties, who were previously heard, but in bankruptcy the party is adjudged a bankrupt behind his back.

Ex parte Glossop, 2 Gl. & J. 268, is a strong case; it was a petition to restrain the bankrupt from proceeding at law to dispute the validity of his commission. The counsel for the bankrupt contended there was not any jurisdiction by petition, in support of which they cited *Flower v. Herbert*, 2 Ves. sen. 326, but they added there

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(a) See note to *Kirkpatrick v. Dennett*, 1 Gl. & J. 300.

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were indeed three cases where the contrary doctrine had been held; *ex parte Grant*, *Buck*, 92; *Kirkpatrick v. Dennett*, 1 *Sim. & Stu.* 408; and *ex parte Cutten*, 1 *Gl. & J.* 317; but they urged that these cases were not founded on principle; and Lord *Eldon*, after examining all the cases, said he was satisfied the only remedy was by bill, and dismissed the petition with costs. In *ex parte Lee*, 2 *Gl. & J.* 332, the injunction issued on petition; but that case was not decided by Lord *Eldon*, as he left the Court before it was adjudged, and Lord *Lyndhurst* was not aware of Lord *Eldon*'s decision in *ex parte Glossop*, 2 *Gl. & J.* 268, as it was not cited.

In *ex parte Thompson*, cited in *ex parte Grant*, *Buck*, 91 (a), Lord *Thurlow* held that he could not interfere on petition. And lastly, in *ex parte Hornby*, *Mont. & Bli.* 1, on a petition presented, the Lord Chancellor stated, in his judgment, that had the case rested simply on acquiescence he was by no means prepared to state that he should issue the order prayed.

It is therefore submitted, that the proper mode of applying to the Lord Chancellor was by bill.

But assuming that the Chancellor would have issued the injunction on petition, it does not follow that this Court can do so. It is incontrovertible that originally the application was by bill, petitions being afterwards occasionally introduced. Now there can be no doubt the Chancellor had jurisdiction to issue the injunction, and it was in his discretion to regulate the method by which applications should be made, whether by bill or petition; but this Court has not jurisdiction to proceed either by petition or bill, it being a matter solely cognizable in a court of equity. Before the year 1817 no practitioner ever conceived that the jurisdiction to

(a) See *Chambers v. Thompson*, 4 *Brown*, C. C. 433.

restrain the bankrupt could be exercised on petition ; subsequently however to that time a practice was creeping in of acting on petition ; but in 1825 Lord *Eldon*, in *ex parte Glossop*, 2 Gl. & J. 268, solemnly reviewed the cases in which the Court had acted on petition, and over-ruled them.

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Mr. *Bethell*, in reply, was stopped by the Court.

The CHIEF JUDGE : —

The question now before the Court is as to the jurisdiction. It is contended that there is none, because before the establishment of this Court the Lord Chancellor, sitting in bankruptcy, had none. The foundation of that argument rests on the assertion that the Chancellor could not, on petition, issue such an injunction. If I found that by the last decision of the Chancellor before the erection of this Court (*a*) it was decided it could not be issued on petition, then this Court would not have power to grant the injunction, the Bankrupt Court Act (1 & 2 W. 4, c. 56,) giving us power to determine “all such matters in bankruptcy as now usually are or lawfully may be brought by petition or otherwise before the Lord Chancellor.”

Were then injunctions “usually” granted by the Chancellor “on petition?” It is said that *ex parte Glossop* (*b*) is decisive that the application should be by bill, and not by petition. To no decision would I bow with greater deference than to Lord *Eldon*’s ; but since his decision, cases have been adjudged the other way ; which, together with the uniform current of practice, shows that, of late, injunctions have issued on petition. The question therefore is, does this case fall within those

(*a*) *Ex parte Hornby*, Mont. & Bli. 1.

(*b*) 2 Gl. & J. 268.

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referred to by the act by the words “usually on petition?” I am of opinion that it does, and consequently that we have the fullest authority and jurisdiction to entertain this petition and decide the question on the merits.

Sir John Cross :—

When a question as to the jurisdiction of this Court arises, it appears to be taken for granted that we have none, unless the question be on all-fours with some former case in the books of reports ; and thus the reported cases are considered as the measure of our jurisdiction ; but the Bankrupt Court Act is that measure, and gives us power in all matters in bankruptcy. Is not the question now before us “a matter in bankruptcy?”

It is an old maxim that *boni judicis est ampliari jurisdictionem* ; the meaning of which is, not that it should be stretched, but that it should be extended so as to cover those doubtful cases in which otherwise a failure of justice would ensue : taken in that sense the maxim is as wise as it is ancient. There is one exception to the maxim, applying to inferior jurisdictions, which the superior jurisdiction always confines within the letter of the act, and for wise reasons. But it would be to surrender our station, which is that of judges of a superior court, if we were to restrain our jurisdiction as if this were an inferior court. All Chancellors, when sitting in bankruptcy, have acted on this maxim ; for where is the ground of the multifarious jurisdiction in bankruptcy ? Not in any statute : that of Henry VIII. gave no other authority to the Lord Chancellor than to fix the great seal to a commission. I believe that no instance of the Lord Chancellor’s exercising any other jurisdiction occurred for a century afterwards. The first case I find was one before Lord

Nottingham concerning (a) a proof, and he was much startled by the application, though he finally made an order. Then the 5 Geo. 2, c. 30, sect. 31, conferred a single power on the Lord Chancellor, viz. to vacate the assignment; and that remained the only legislative authority till Sir *Samuel Romilly's* Act (b) gave power to the Lord Chancellor to order payment of dividends. And, finally, Lord *Eldon*, in *ex parte Bradley*, 1 *Rose*, 203, observes, "I am convinced that it was the intention of the legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him power to use in bankruptcy the authority used in cases in chancery where no specific authority is given by the statutes. In this Lord *Hardwicke* supports me."

Under this state of things this Court was instituted; and its jurisdiction is given by general words, which, like all general words, leave some room for doubts, which it is our duty to remove as fast as they arise. It would be little short of an absurdity to suppose that the legislature could have intended we should have no jurisdiction, save in cases precisely parallel to those in which the Lord Chancellor had before acted: the words of the statute are, that we shall have superintendence and controul in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order and allow, all such matters in bankruptcy as now usually are or lawfully may be brought by petition or otherwise before the Lord Chancellor.

I agree with his Honor the Chief Judge in his interpretation of these words; but that is not all: the act says, or "lawfully may be brought." I think these words

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(a) Anon. 1 Ca. in Ch. 275, 1676.

(b) 49 Geo. 3, c. 121, sect. 12, now 6 Geo. 4, c. 16, sect. 111

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enable this Court to hear many causes on petition which the Lord Chancellor would only have heard on bill. The Lord Chancellor often ordered bills to be filed as a matter of discretion and expediency, when he could have decided the question on petition. But be that as it may, we have jurisdiction in all matters in bankruptcy, and this is one.

The Court of Chancery was loaded with more business than could be transacted there, cases were in arrear for years, and therefore the bankruptcy business was transferred to this Court: consequently it is not our duty captiously to repudiate jurisdiction. I am of opinion that it was the intent of the legislature to send here all matters in bankruptcy, and that whenever a question of jurisdiction arises, our first consideration should always be, is it a matter in bankruptcy?

I entertain no doubt but that the present case is clearly within our jurisdiction.

Sir George Rose:—

As the Court from which our jurisdiction is transferred proceeded in such cases as the present on petition, we are bound to do the same.

No practitioner would, of late years, have advised a bill in order to obtain the Chancellor's decision on the subject matter of this petition. I am ready to admit, however, that my private opinion always has followed those of Lord *Thurlow* and Lord *Eldon*, that to file a bill was the proper course to pursue; but such has not been the practice.

The Court can stay any action brought by the bankrupt in any court.

If we are right in deciding that we can interfere in the present case on petition, then our jurisdiction extends further than is imagined, and will enable us to stay any action that the bankrupt may bring in any court. Such

will be the result, which is inevitable ; and I only now mention it lest it should be imagined the Court does not foresee the consequences of its judgment.

In *ex parte Bryant*, 1 Ves. & B. 211, the application was by petition, and the ablest counsel were engaged ; so that if any rule prevented the hearing on petition it would have been noticed. There are certainly cases in which it has been held that the proper mode of proceeding was by bill ; but the preponderance of authority leans the other way : the present Master of the Rolls, the present Vice Chancellor, and the present Chancellor, are all of opinion that injunctions may issue on petition, in which the profession have acquiesced, and it is now the settled practice. So that if we declare we have no jurisdiction on petition, we place the Court in great difficulty, and do a thing not very decent to the Lord Chancellor, whose last decision was that petition was the proper mode. It has been said that in all cases where courts interfere to protect their officers there has been a decree on which the court acts : is not the adjudication in bankruptcy sufficiently analogous, for this purpose, to the decree in equity ? and as to the adjudication being *ex parte*, the bankrupt in the present instance has admitted the validity of the bankruptcy in an order which he obtained to enlarge the time for his surrendering.

In lunacy, though a person has been found lunatic, and a committee appointed, yet the finding may be traversed ; nevertheless the Lord Chancellor might restrain actions against the committee. Now what is the foundation of the jurisdiction in lunacy ? A mere authority from the crown.

In a suit a receiver might be removed, nevertheless the Court might even then restrain tenants from bring-

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ing actions against him. When a bill is filed for the administration of assets, the Court would restrain creditors, though not parties to the bill, from proceeding against the executors at law. Where a sequestration had issued which was set aside, and an action thereupon brought against the officer, yet that action was restrained, and on petition, *Frowd v. Laurence*, 1 Jac. & W. 655.

All these cases are instances of a jurisdiction perfectly independent of that exercised in equity, and is that which every court can exercise for the protection of those officers, and others, to whom its proceedings are directed.

On the general question as to the extent of the jurisdiction of this Court, I never understood that we had any further than the Lord Chancellor had when the Bankrupt Court Act came into operation. That the legislature intended to give this Court a more extended jurisdiction is to me clear, but it has not done what it intended.

When questions of jurisdiction arise, I always consider whether we can proceed to commit a party disobeying our order; that is the test; and in this case we could commit the bankrupt if he proceed with the action, if we think fit to order him not to proceed.

Mr. *Swanston* and Mr. *Russell*, on the merits (a):—

1. It is submitted that the assignees cannot show that this commission can be supported in equity.

(a) During the progress of the case Sir *George Rose* said he thought he had a recollection that the bankrupt had petitioned to supersede in 1813, and that his petition was dismissed with costs, to be paid by the bankrupt personally, if the estate were not sufficient to pay them.

2. No degree of mere passive acquiescence enables the Court to make the order prayed; there must be active interference.

Injunctions to restrain actions were always considered as special interpositions, requiring a special equity to sustain them, being applications to the extraordinary jurisdiction, which all courts are most unwilling to exercise. Out of bankruptcy it is never done till after a question has been tried and retried; and the action is obviously a mere pretence for harassing the other party. The present case has been tried twice, and in the action of 1814, the verdict was against the validity of the commission.

Lord *Eldon* has said, that the first duty of an assignee is to satisfy himself of the validity of the commission (a); here a verdict has been given against it.

[The CHIEF JUDGE:—Its validity was not fairly tried; the assignees had no notice of the intent to dispute the commission, and were not prepared with witnesses to sustain it.]

2. There is only passive acquiescence in this case, which, according to the opinion of the Lord Chancellor in *ex parte Hornby, Mont. & Bli.* 1, is not sufficient. His Lordship's words are, "Had this case rested simply on acquiescence, I am by no means prepared to say that I should have issued the order." The circumstances of that case, however, were stronger than appear in the report. The bankrupt lived for sixteen or seventeen years at Paris, communicated with Mr. *Bell* in England every month, and yet did nothing during all that period to disturb the bankruptcy. Then there was a petition to supersede, and an issue directed, which was tried at

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Ex parte
DAVY
and others.
In the matter
of
CHAMBERS
and others.

Statement of
facts in *ex parte*
Hornby, Mont.
& *Bli.* 1.

(a) *Ex parte Graves*, 1 *Gl. & J.* 86.

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Ex parte
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Guildhall, and the bankrupt examined *viva voce*; after which there was a motion for a new trial, which Lord *Ellenborough* refused, being perfectly satisfied with the verdict.

In *ex parte Cutten*, 1 *Gl. & J.* 317, the Vice-Chancellor says, "The difference between this case and *ex parte Kirk (a)*, and which takes the present entirely out of the principle of that case, is, that in *ex parte Kirk* there was only delay and passive acquiescence on the part of the bankrupt; here there has been active co-operation on the part of the bankrupt. For delay alone this Court merely refuses to interfere before a trial establishing his legal rights. In the present case the bankrupt's active interference with the administration of his estate amounted to a pledge to his assignees that he would not attempt to disturb the commission; and of such concurrence there is abundant evidence in his having executed deeds and taken measures to obtain his certificate; and having thus, while it appeared beneficial, taken advantage of his commission, he shall not be allowed to impeach it. His conduct has been calculated to induce the assignees to prosecute the commission in security; and the same rule must be applied as where a bankrupt harasses his assignees with repeated actions; and in such cases this Court will not only not relieve the bankrupt in the first instance, but will restrain him from proceeding at law."

In *Thorpe v. Goodall*, 17 *Ves.* 393, Lord *Eldon* was of opinion that a bankrupt was not to be restrained till after he had repeatedly questioned the validity of his commission and thwarted his assignees, and where his conduct was vexatious; whereas here there is no vexatious conduct, because the commission has been declared

(a) 15 *Ves.* 464.

invalid by a verdict. In *ex parte Kirk*, 15 *Ves.* 464, the bankrupt had acquiesced for three years, yet on a petition to supersede Lord *Eldon* directed an action to be brought.

There are several other cases (*a*), and among them *ex parte Grant, Buck*, 90, which need not be cited, as they are familiar to the Court. In *Flower v. Herbert*, 2 *Ves. sen.*, 325, nothing was done which could be a precedent for this application.

The actual reason for the allowance of the demurrer in *Kirkpatric v. Dennet*, 1 *Sim. & Stu.* 408, was, that there was no ground for the interference of the Court; the Vice-Chancellor's words being, "Independently, however, of the question of jurisdiction, I shall allow this demurrer, upon the ground that the bill does not state a case which entitles the assignees to the injunction."

In *ex parte Hill, Mont.* 9, the Vice-Chancellor did not entertain the petition; it was dismissed, there being no acquiescence.

It is a principle of courts of equity not to grant injunctions if there have been any delay in applying for them. This petition is to stay an action commenced in September 1832: the cause was on the eve of a trial, notice of trial was given, and witnesses summoned, and the trial was only then put off in consequence of this petition. Such delay is alone enough to cause the dismissal of this petition.

As to the protection afforded to the officers of the Court, that is always without reference to time, or the conduct of the officer; but these are always important considerations in cases like the present.

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(a) All the cases are referred to *ex parte Hornby, Mont. & Bli.* 9.

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It has been contended that the length of time which has elapsed entitles the petitioner to his injunction. In equity the doctrine as to lapse of time being a bar only applies against plaintiffs, but not to defendants; and here the bankrupt is the defendant, and the petitioner seeks to deprive him of a legal right on account of lapse of time.

Mr. *Bethell* was not called on to reply.

The CHIEF JUDGE: —

Even if the bankrupt were the only person to be considered, it might be most merciful to him to grant the injunction; but justice to others requires that we should adhere to one of the first principles of equity, that trustees and officers of a court should be protected from vexatious litigation.

In the present case the petitioners are assignees, and have been engaged since 1813 in getting in and managing the estate, and no proceedings adverse to them taken till 1832. The legislature has not prescribed any time within which bankrupts are confined in disputing the validity of the commission at law, but equity steps in to interfere. It is urged, however, that this Court can only restrain an action after active interference or repeated decisions against the bankrupt, and that even if passive acquiescence were enough, there is not even that in this case. There is no evidence here of active interference, nor have there been repeated verdicts against the bankrupt. The action tried in 1813 is of no weight either way; the bankrupt was not party to it, and the creditor gave no notice to dispute the commission, but took the assignees by surprise, on which account a new trial was granted, though what became of it is unknown.

The action of 1824 did not try the validity of the commission, being met by a plea of the statute of limitations; but that very circumstance called on the bankrupt to take other steps, and obtain his rights by more efficient means. The assignees were in possession of the property; why did not the bankrupt proceed against them? It has been said his poverty prevented him; such was not the case, as he brought an action against *George*; besides, he might have proceeded *in formá pauperis*.

In 1832 the bankrupt petitioned to supersede; we refused on the ground of long acquiescence: but though long acquiescence was enough to induce us to refuse to supersede, it would not alone enable us to grant the injunction now asked. It has been said that the Lord Chancellor expressed doubts in *ex parte Hornby, Mont. & Bk. 1*, as to whether he could interfere on mere acquiescence; but his Lordship's judgment shows he thought that there was no rule to prevent his interference on passive acquiescence alone, otherwise a bankrupt might lie by till the assignees, the petitioning creditor, and the witnesses were all dead, and then petition to supersede.

In this case the bankrupt appears to have been well informed of all the circumstances; he was not lulled to sleep by his assignees taking no steps. He now urges that the commission was fraudulent, and that there is plainly no act of bankruptcy. If such were the case, he knew it well, while he suffered the assignees to involve themselves in a suit, and to get in and sell all the property. Under these circumstances, and after the lapse of twenty-two years, it would be unjust to allow the action to proceed.

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Ex parte
DAVY
and others.
In the matter
of
CHAMBERS
and others.

Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing actions.

Sir John Cross:—

This commission issued upwards of twenty years ago.

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Ex parte
 DAVY
 and others.
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 of
 CHAMBERS
 and others.

The bankrupt insists he was then perfectly solvent, and had committed no act of bankruptcy; if so, he should immediately have brought an action, or presented a petition to supersede, instead of which he petitioned to enlarge the time for his surrender. He did not, however, surrender till seven years afterwards, when he was examined and committed. Still he neither brought an action nor petitioned, and was discharged from prison on the ground that the behaviour which led to his commitment must have proceeded from imbecility of mind. He then brought an action of trover, which was barred by the statute; whereas he might have brought an action for false imprisonment, which would not have been barred, but where he would both have obtained damages and upset his commission.

Just as twenty years are about to expire, which would be a bar to ejectment, he sets himself in motion, and brings eleven actions of ejectment. Now this bankrupt is said to be a pauper, yet he finds money wherewith to carry on eleven actions, to petition here to supersede, and to oppose this petition. On his petition to supersede, this Court ordered him to pay the costs, which he has not yet done, and is therefore in contempt. Do not all these circumstances furnish sufficient of equity on which to found the injunction asked?

Petitioning to enlarge the time for surrender, a slight act of acquiescence. Lying in prison under a commitment by commissioners, a strong act of acquiescence.

He is carrying on eleven actions of ejectment, and refusing to pay the costs of the supersedeas; is not this vexation? Is not the lapse of so many years an acquiescence? and is not the petitioning to enlarge the time for his surrender also an act of acquiescence, slight no doubt, but still an act of acquiescence? His lying four years in prison is a strong act of acquiescence. If any motive could urge a bankrupt to upset his commission, it would be the deprivation of liberty by the commissioners.

Under these circumstances, if the Court after twenty years refused to interfere, the greatest injustice would be done, and bankrupts need only wait till all those who could furnish evidence in support of the bankruptcy are dead, and then bring an action of ejectment. The bankrupt must be restrained from proceeding.

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Ex parte
DAVY
and others.
In the matter
of
CHAMBERS
and others.

Sir George Rose :—

In this case the bankrupt has brought an action against a purchaser under the commission, and the question is, whether we can restrain him? Whether we consider the length of time, the acquiescence of the bankrupt, the protection due to officers of this court, or the vexatious conduct of the bankrupt in bringing an action against a purchaser, either of these alone would enable us to grant the injunction. The only action we would not restrain in this case, would be one in which the bankrupt intended fairly to try the bankruptcy. Suppose we had not already dismissed this bankrupt's petition to supersede. Suppose he had a verdict in his favour, and then came here to supersede, would this Court do so under the circumstances of this case? The petitioning creditor is dead, one of the assignees is dead, the two other bankrupts have obtained their certificates, and there are purchasers under the commission. If, when the bankrupt petitioned to supersede, we had been made acquainted with the fact that actions brought by him were pending, we should have put him to his election, whether he would proceed with his petition or actions (a); and as he pursued his petition, he may be said actually to have elected to pursue the petition, thereby virtually electing to abandon the actions.

The Court would not restrain an action in which the bankrupt intended fairly to try the validity of the commission.

If bankrupt petition to supersede, having actions pending, he must elect.

(a) See *ex parte Pownall*, *post*, and *ex parte Daly*, *post*.

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Ex parte
DAVY
and others.
In the matter
of
CHAMBERS
and others.

Quære. Whether simple contract creditors be barred by the statute of limitations after a supersedeas.

His two partners having obtained their certificates is, again, enough to prevent him upsetting the commission. Another consideration is, that it might be a question, whether the creditors are not estopped, from proceeding at law, by the statute of limitations. I say it might be a question; but whether that would be the case or not, if the commission were superseded, is not now a point before the Court, and I give no opinion on the subject.

Injunction ordered.

Ex parte MOWBRAY.—In the matter of
SURTEES.

C. of R.
Jan. 21,
1834.

Quære. Whether, on distributing unclaimed dividends, any further assets should at the same time be set apart on account of the same proof.

THIS was a petition for the direction of the Court on a question connected with unclaimed dividends.

In April 1832 the Court of Review ordered 1,716*l.*, unclaimed dividends, to be distributed in the usual manner. (a) In September 1832 a meeting was held to

(a) The words of the order, which was the usual one, were, as to the material parts, in the following words: "That out of the sum of 1,716*l.*, the amount of the unclaimed dividends admitted by petitioners to be in their hands as assignees, the costs of petitioners of and occasioned by that application and of the meeting after mentioned, be in the first place paid, such costs to be set-

tled by the commissioners; and that a meeting of the commissioners be called, of which due notice be published in the London Gazette; and that at such meeting the commissioners should order the remaining balance of the said unclaimed dividends (after providing for the costs before mentioned) to be divided rateably amongst and paid to the creditors who had

distribute these unclaimed dividends, and also to make a further dividend out of the sum of 12,390*l.* then in the hands of the assignees. A dividend of 1*d.* in the pound was declared payable out of the 1,716*l.*, excluding the creditors who had not claimed; and the 1,716*l.* being exhausted thereby, the commissioners set aside 1,851*l.* out of the sum of 12,390*l.*, in order to make good the 1,716*l.* (the amount of the unclaimed dividends just distributed), in case the unclaiming creditors should thereafter appear and claim the same, and also to answer the subsequent expences under the commission.

The petition urged that the commissioners had put a wrong construction on the order of the Court of April 1832, in ordering the sum of 1,851*l.* to be so set apart, and prayed that this sum of 1,851*l.* might be distributed as unclaimed assets.

Mr. *Swanston*, for the petitioner, urged, it was obvious the legislature had not contemplated the state of facts existing in this case; that the distributing one sum and reserving another of the same amount was nullifying the clause; and that the practical result was the same as if the commissioners had not even touched the 1,751*l.* The 6 Geo. 4, c. 16, s. 110, however, enacts, that, after the order of the Court for the division of unclaimed dividends, "the proof of the creditors to whom such dividends were allotted shall from thenceforth be consi-

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MOWBRAY.
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SURTEES.

proved, other than the creditors who had not claimed their dividends; and that the proofs of the creditors to whom such dividends were originally allotted should from thenceforth be considered as void as to the same, but re-

newable as to any future dividends, to place them *pari passu* with the other creditors, but not to disturb any dividends which should have been previously made under the said commission.

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dered void as to the same, but renewable as to any future dividends." The commissioners had, therefore, reserved a sum in respect of a proof declared void by the express terms of the statute, which only enables the creditor to do some act in order to renew the proof as to future dividends.

The CHIEF JUDGE : —

I am of opinion that the 1,851*l.* which has been set apart, should have been divided, and the unclaiming creditors should have had their share thereof set apart, and if, after three years, this new dividend were unclaimed, it would become subject to fresh distribution.

It is the duty of the Court, in this case, to give the widest scope for the most liberal interpretation of the act, in favour of the claims of those creditors for whom dividends are set apart; but the commissioners are not quite correct in locking up the whole 1,851*l.*

Though the act makes use of the word "void," yet it is only "void" if no act be done by the creditor; the proof ought not to be considered as utterly struck off, but as retained so as to be "renewable" the moment the creditor comes in; from that time he is to stand *pari passu* as to future dividends. Therefore no order should be made as to immediate distribution of the whole sum in question.

Sir *John Cross* : — This is a new question as to the interpretation of an act of parliament, on which I have not quite made up my mind, and I wish for further time to consider of it.

Sir *George Rose* : —

It is certainly difficult to find that the commissioners have closely followed the words of the statute, never-

theless there is so much equity and good sense in their decision that I am not willing to disturb it.

The conclusion to be drawn from the act comes to a very short point. Unless creditors can obtain an order to distribute unclaimed dividends under the very words of the act, they have no equitable claim. The statute says, "the Court, if it shall think fit, may, after the same shall have remained unclaimed for the space of three years," &c.; our power therefore does not extend over any sums or dividends not unclaimed for three years, and the sum in question has not yet been unclaimed for three months.

Though the act makes use of the word "void," it does not mean utterly void; to render a proof utterly void it must be "expunged," which word the act uses on other occasions. Till the proof be formally expunged, the assignees must recognize the party as a creditor. The act does not use the word "expunge," but "void," and then explains how far void, that is, as to the dividends which have remained unclaimed for three years, and have been distributed under the order of the Court, but not void as to future dividends; so far from it, the unclaiming creditors are to be placed "*pari passu*" as to them.

Whether this view of the case be correct or not, we cannot proceed to declare that the commissioners are wrong, in the absence of the parties whose rights are sought to be effected.

Petition dismissed. Costs of assignees out of the estate.

The CHIEF JUDGE:— Upon reconsideration, I think the better method of proceeding in the present case would be, to call on the commissioners to divide the

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MOWBRAY.
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 of
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1,851*l.*, and, if they declined, the question might properly be brought before the Court; but the form of the prayer of the present petition was not such as to enable the Court to make any order.

C. of R.
 Jan. 21,
 1834.

Ex parte BEAUMONT.—In the matter of
 EDMONSTON.

An assignee can have leave to bid under very special circumstances only. The consent of a meeting of some of the creditors is not sufficient.

THIS was a petition by an assignee for leave to bid at a sale of part of the bankrupt's property.

Mr. *Swanston* for the petition: —

The only ground of objection to the order asked is, that an assignee, being a trustee, ought not to become a purchaser. But this can be no objection when the creditors, who are the *cestuis que trusts*, conceive it beneficial, and consent.

[*Per Curiam*:—Has the bankrupt been served? (a)]

He has not, but it is submitted that it is unnecessary. In *ex parte Bage*, 4 *Madd.* 459, Sir *John Leach* was prepared to allow assignees to bid, if they obtained the consent of a meeting of creditors, and then presented a petition, which is the course pursued in this case. And in a case reported as anonymous in 2 *Russ.* 350, the assignee was allowed to bid, having obtained the permission of a meeting of creditors.

Per Curiam:—The order asked is one which should only be made under very special circum-

(a) See *ex parte Bage*, 4 *Madd.* 459.

stances. (a) The only special circumstance here is, that a meeting of creditors was summoned, who consented, but all those who had proved did not attend; in fact, only about half in value attended, and those who were present could not, on such a point, bind those who were absent. (b)

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Ex parte
BEAUMONT.
In the matter
of
EDMONSTON.

Petition dismissed.

Ex parte COPELAND.—In the matter of
WESTON.

C. of R.
Jan. 22,
1834.

THIS was the petition of a creditor to remove an assignee on the ground of poverty, and of being in insolvent circumstances. It involved other facts not necessary to state. (c)

If a sole assignee be very poor, and alleged to be in insolvent circumstances, and elected by suspicious votes, a co-assignee may be appointed.

Mr. R. V. Lee, for the petition, was stopped by the Court.

(a) In *ex parte Hodgson*, 1 Gl. 393; *Campbell v. Walker*, 5 Ves. & J. 14, on a petition by a mortgagee for a sale and leave to bid, the assignees asked leave to bid in their private character, but the Vice-Chancellor refused, saying, "I will never make such an order without very special circumstances."

(b) As to the effect of the consent of a meeting of creditors, see the decisions and *dicta*, which are contradictory. See *Whelpdale v. Cookson*, 1 Ves. sen. 9, and 5 Ves. 682; *ex parte Bennett*, 10 Ves.

(c) The petition alleged that the assignee had been elected by friends of the bankrupt, and had not taken proper steps to recover portions of the bankrupt's estate.

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Ex parte
 COPELAND.
 In the matter
 of
 WESTON.

Mr. *Swanston* and Mr. *G. Richards*, for the assignee :
 — There is no precedent for the removal of an assignee on the ground of poverty, or on a general allegation of his being in insolvent circumstances ; actual insolvency, or bankruptcy, is necessary to enable the Court to act. Suggestions for the removal of trustees, because poor, are always repelled by the courts with indignation. Who can define poverty ? This assignee says he can procure security for 1,000*l.* ; this, compared to the state of some, is poverty, compared to the state of others, boundless wealth. The commissioners have power to reject any assignee when about to be chosen, and often ask “ Are you solvent ? ” and if he reply in the affirmative, they never reject him because he is poor.

The pecuniary circumstances of this assignee are in precisely the same state as when he was elected by creditors who well knew what these circumstances were ; there is no allegation of misconduct ; no suggestion that he is likely to misapply the bankrupt’s small estate. In equity a motion for the removal of a receiver must be supported by evidence of misconduct.

Mr. *R. V. Lee* was not called on to reply.

THE CHIEF JUDGE :— I would not accede to the prayer of this petition, if so doing would cast the slightest slur upon this assignee, or involve him in the smallest expense. The sole question is, whether the creditors should not be allowed to protect the estate by the appointment of another assignee ? Mere poverty would not be a sufficient reason for the removal of an assignee ; nor can an assignee be removed on the ground that the persons electing him had proved debts improperly, unless a petition to expunge be presented and served on the creditors, but no such petition has been presented in

Mere poverty
 no ground to
 remove an
 assignee.

this case; but if the creditors who elect an assignee be relations, and the debts *prima facie* of a doubtful nature, that might furnish a ground for removal of an assignee, though such creditors were not served. Having regard to the circumstances of the debts proved in this case, and who were the creditors who elected the present assignee, it is our duty to put some other person with him as co-assignee.

Sir John Cross : —

I have long entertained an opinion that a sole assignee should never be elected. The poverty of an assignee is no objection when there are others over whom he might be vigilant, but it may be an objection to his being elected alone.

This assignee was, in 1832, in arrear for two years rent, which was only 8*l.* per annum, and it does not appear that it is even yet paid; it is stated, and not contradicted, that the whole of the furniture in his house is not worth 7*l.*, and he has been repeatedly summoned for small debts; consequently there is not only evidence that he is poor, but also that he is in insolvent circumstances, and on that ground should not continue sole assignee.

Sir George Rose : — It has been stated that the insolvency of a trustee is not a sufficient cause for his removal. No doubt that is correct; but the insolvency or bankruptcy of an assignee is sufficient. It cannot be considered fit that the respondent should remain sole assignee under the circumstances of the case. The argument for the respondent may or may not be good to the extent that there are no sufficient grounds for removal, but still it is expedient to appoint a co-assignee, in nature of a receiver; if so, and this be not a question

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If the creditors who elect an assignee be relations, and their debts *prima facie* of a doubtful nature, the assignee might be removed, without serving the creditors.

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Ex parte
COPELAND.
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of
WESTON.

of costs, (as none are even prayed), the whole question resolves itself into whether, if the Court be satisfied he be in insolvent circumstances, a *quasi* receiver should not be appointed? The commissioner has a power even to reject an assignee (*a*), and surely he cannot have a more extensive authority in this matter than this Court.

Commissioner
to appoint a
quasi assignee,
the voters who
would elect the
new assignee
being suspi-
cious.

The order made was, that the commissioners do appoint one or more persons to act as assignees with the present assignee. The costs to stand over till after such appointment by the commissioners, with liberty to any party to apply.

C. of R.
Jan. 22,
1834.

In the matter of LEVET.

If the fiat be
lost, a new one
must be issued.

MR. SWANSTON:—In this case a bag containing the fiat and other papers has been lost out of the mail. The commissioners decline to proceed. I therefore ask that a duplicate fiat may issue.

[*Per Curiam*: — You had better take a renewed fiat.]

That supposes the existence of the original fiat, which is a matter for evidence, and it is desirable to prevent being called on at some future time to furnish such evidence.

[*Sir G. Rose*: — Should you not apply to the Lord Chancellor?]

Such applications are usually made to this Court, and the order made here, authorizes an application to the Lord Chancellor, when the order is confirmed as of course, by the officer of the Lord Chancellor.

Per Curiam:—A duplicate fiat was never yet heard of. The better course will be to take a new fiat altogether. Whatever is done is well done. The fiat exists, though not to be found. (a)

1834.
—
In the matter
of
LEVET.

Ex parte PEAKE.—In the matter of BIGNOLD.

A PETITION in this matter was answered for the 24th instant, and the affidavits in support were sworn, but the petition had not yet been served. (b)

C. of R.
Jan. 22,
1834.

A petition will not be answered *nunc pro tunc*, where affidavits have been sworn.

Mr. *White* moved that the petition might be re-answered *nunc pro tunc*, retaining the original answer in order to save the necessity of re-swearing the affidavits. (c)

Per Curiam:—There is no precedent for what is asked. It being possible that indictments for perjury might become necessary, it is not advisable to antedate the answer to the petition.

(a) *Qu.* Must not the lost fiat first be superseded? If so, does not all that has been done under it fall to the ground?

day of serving and exclusive of Sundays, though an intermediate day.—Orders, Court of Review, January 1832.

(b) The petition is to be served four days before the expiration of the time at which the attendance thereon is ordered, except in the case of a petition to stay a certificate. But the above directions to be without prejudice to any application to the Court, in respect either of the attendance of or service on parties, or the hearing of a petition. The four days to be taken as exclusive of the

(c) An affidavit sworn before the petition is answered cannot be used, *ex parte Northwood*, 2 *Rose*, 246; *ex parte Overton*, 2 *Rose*, 257; *ex parte Parks, Buck*, 532. Affidavits in support of a petition to stay the certificate furnish the only exception to this rule, by Lord *Loughborough's* order of the 12th April 1796, and Lord *Eldon's* of 16th November 1805.

C. of R.
Jan. 27,
1834.

Rule as to superseding fiat for misdescription of the bankrupt.

Ex parte MILLS.—In the matter of COLEMAN.

THE petition stated, that on the 19th of January 1833 a fiat issued against *Coleman*, on the petition of *Adam Dixon*; that the bankrupt was therein described as *Samuel Coleman*, late of Ware in the county of Hertford, but now of Shottisham in the county of Norfolk, miller, dealer and chapman; that up to September 1832 the bankrupt resided at Ware Park Mill in the county of Hertford; that in November 1832 he went to reside with his brother in the parish of Stoke Holy Cross in the county of Norfolk, and that the petitioner never heard of his being of Shottisham; that Hare Park Mill is not in the town of Ware, but upwards of a mile from the town; that three or four nights before the fiat issued the bankrupt slept at a house at Shottisham, which was his only residence at Shottisham.

In December 1832 the petitioner commenced an action against the bankrupt, which was stopped by the bankruptcy.

The petitioner stated that the act of bankruptcy and fiat were both concerted between the bankrupt and others to deprive the petitioner of his debt, and prayed to rescind or annul the fiat. Other facts are stated in the judgments.

Mr. *Stinton*, in support of the petition, cited *Stewart v. Richman*, 1 *Esp.* 108, where Lord *Kenyon* said, “it was not now to be questioned, whether, if a trader by concert with his creditors commits an act of bankruptcy, that such can be good to support a commission; that whatever idea of policy or propriety first suggested it, and though it might appear that a commission of bankruptcy is the most equitable mode of dividing the bank-

rupt estate among his creditors, that it was now settled that a trader could not legally concert an act of bankruptcy with his creditors."

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of
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Mr. *Swanston* for the petitioning creditor.

Mr. *Austin* for the assignees.

The bankrupt was served, but did not appear.

The CHIEF JUDGE:—In this case a creditor who has proved, seeks to supersede on the ground of mis-description in the fiat, and fraud in issuing it. The instances in which commissions and fiats have been superseded on the ground of mis-description are, either where the error was so gross as to mislead the creditors, or where, though not so gross, yet the petitioner undertook to issue a new fiat, or where two commissions existed, and the Court supported that which contained the most accurate description. In this case the mis-description did not deceive the petitioner, as he came in and proved, and there is no pretence for saying that any other creditor was deceived. As to the charge that the act of bankruptcy and the fiat were concerted, there are certainly strong circumstances of suspicion, if not more, to show that the fiat issued in order to defeat the petitioner's action, and that the bankrupt knew that fact; and I do not say that we would not have superseded, if the application had been made immediately the fiat issued; but the petitioner heard of the fiat before it issued; when it did issue, he dropped his action, came in and proved, and stood by, while the petitioning creditor and others came in under the fiat, and allowed the bankrupt to obtain his certificate, and then came to supersede. This is not a case for a supersedeas.

A concerted
bankruptcy may
be superseded,
if application be
made promptly.

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—
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 MILLS.
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 of
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Sir *John Cross* :—As to this fiat being concerted, it appears pretty clear that the bankrupt, his brother, and the solicitors concocted the fiat. But the petitioner has voluntarily become a party to the whole; he had notice of what was going on, and, nevertheless, came in under the fiat, and allowed the bankrupt to obtain his certificate. This is not a fit case for our interference.

Sir *George Rose* concurred.

Petition dismissed, with costs.

C. of R.
 Jan. 27,
 1834.

When a petition stands over to serve a necessary party, costs of the day are not of course.

Ex parte THOMPSON.—In the matter of WILKS.

MR. *SWANSTON*, with whom was Mr. *O. Anderdon*, took the preliminary objection, that this was the petition of one assignee, the other not a party, either as petitioner or served as a respondent.

The Court said the petition must stand over to have the other assignee served.

Mr. *Swanston* :—The petitioner paying us the costs of the day.

The Court intimated that the question of costs should also stand over.

Mr. *Swanston* and Mr. *O. Anderdon* :—

Whenever a petition stands over that a necessary party may be served, the petitioner must pay the respondents their costs of the day; such has been the in-

variable practice. Costs are only reserved when their payment depends on circumstances which cannot be ascertained, or not so well ascertained, till a future hearing; but nothing that can possibly be stated at the hearing can deprive us of our right to the costs.

[The CHIEF JUDGE :—We have discretion as to costs under section 5 of 1 & 2 W. 4. c. 56.]

That is, a judicial discretion, to be governed by considering how it had been exercised by former judges; and, according to the practice, the costs of the day, in a case like this, are so much of course, and the practice so uniform, as to disable the Court from declining to give them on the present occasion. In *ex parte Warner re Mier*, MS., before Lord *Eldon*, the objection of want of parties twice prevailed, and the petitioner twice paid the costs of the day.

Mr. *Koe*, for the petition, was not called on by the Court.

The CHIEF JUDGE :—There is no invariable rule that the petitioner must pay the costs of the day when a petition stands over to serve an absent party.

Sir *John Cross* :—The Court have a discretion; but I concur in what has fallen from counsel, that such discretion, when possible, should be exercised in pursuance of some general rule. One general rule is, that costs follow the decision, unless there be particular circumstances; another general rule is, that the costs of the day are of course; but there may be particular circumstances forming an exception to that rule.

Sir *George Rose* :—In this case the absent assignee is, formally, a necessary party, but if he be not essentially interested, probably the party objecting to the hearing

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THOMPSON.
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of
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on the ground of his absence, would not be allowed the costs incurred by enforcing that objection. Before Lord Eldon the costs of the day were not always asked, or if asked were not always given; where, in a forlorn case, the objection of want of parties was taken: the costs were constantly reserved. The registrar's book will furnish very many cases to show this.

Petition to stand over. Costs of day reserved.

C. of R.
Feb. 6,
1834.

Ex parte POWNALL. — In the matter of
POWNALL.

Where the bankrupt petitions to supersede, having commenced actions, he must undertake to stay them, and not to bring others without leave of the Court.

THIS was a petition to supersede presented by the bankrupt. (a) When it was called on,

Mr. Montagu, (with whom was Mr. Russell,) for the respondents, stated, that two actions were pending, both brought by the bankrupt; one against the petitioning creditor, and the other against the messenger. The petitioner must therefore elect either to proceed here, and discontinue the actions, or, if he proceed with them, to have his present petition dismissed. He must also undertake not to bring any other action, unless he succeed in superseding. In *ex parte Jackson, Mont. & Bl.* 396, note (b), the reporters observe, "without this condition the bankrupt might gain an inspection of the requisites."

Mr. Swanston and Mr. G. Richards, for the petition, resisted the application.

(a) See this case in another stage, *ante*, p. 116.

The Court said, this being the first time the point had formally been discussed, and as the decision would establish a rule of practice, the Court would consult.

The Judges accordingly left the Court for some time. On their return,

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Ex parte
POWELL.
In the matter
of
POWELL.

Per Curiam :— The Court are of opinion, that the bankrupt should undertake to discontinue the present actions, and not to bring any other actions having for their object to try the validity of the fiat, without leave of the Court.

Mr. *Swanston*, having consulted with the petitioner, who was in Court, stated that he had no objection to give the required undertaking.

The petition was then proceeded with. (a)

Ex parte GRAVES. — In the matter of WYATT.

C. of R.
Feb. 14,
1834.

MR. *AYRTON* moved for leave to strike new docket papers and amend the fiat, the place of business of the bankrupt being omitted in both.

Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business.

Per Curiam :— We cannot allow the amendment asked, it being no default of the office, but of the parties. If the docket papers had been correct, and the error originated with the office, it might have been different. The better course to pursue will be to supersede the present and issue a new fiat.

Quare, If the docket be correct, and the fiat incorrect, through the error of the office.

(a) See *ex parte Dick*, 1 *Rose*, 51; and see *ex parte Daly*, *post*, and *ex parte Hardenberg*, 1 *Rose*, 206; *ex parte Davy*, *ante*, p. 299. *ex parte Burgess*, *Jacob*, 559;

C. of R.
Feb. 18,
1834.

Ex parte PRESCOTT and others. — In the matter of THOMPSON and MILDRED, and in the matter of EVANS.

If a party take bills for the price of goods, and it be agreed that the bills are to be paid out of the proceeds, and the acceptors become bankrupt, the indorsees of the bills, without notice of the agreement, are entitled to the benefit of it.

ON the 1st of December 1831 a commission issued against *Thompson* and *Mildred*.

On the 22d of December 1831 a commission issued against *Evans*.

Evans was a warehouseman and factor, and engaged with *Thompson* and *Mildred* in various shipments for the foreign market on their joint risk, one of which is the subject of the present case. Being engaged in selling goods on commission, he was anxious it should not be known he was concerned, on his own account, in such transactions.

In August 1831 *Evans* and *Thompson* and *Mildred* made some joint shipments, under the following circumstances. *Evans* supplied the goods, and drew bills on *Thompson* and *Mildred* for the amount, which they accepted. The following letter, prepared by *Thompson* and *Mildred*, was signed by *Evans*: —

“ Messrs. *Thompson* and *Mildred*,
“ London.

“ Having sent you an invoice, dated 23d August, for, &c., amounting to, &c., and you having shipped the same to your correspondents at Smyrna, &c., as per bills of lading, I hereby engage to be responsible to you for half the loss that may arise on the foregoing enumerated goods; and having drawn bills on you for the whole amount at dates convenient to myself, I hereby engage to renew the same until funds come round, without any charge for interest or stamps, until

the 4th of April 1832. Should any profit arise on the net proceeds of these, I shall look to you for my half share.

“ I am, &c.

“ J. EVANS.”

The invoices accompanying the goods were, as to the material parts, as follows : —

“ Per account of Mr. *John Evans* : but having accepted bills against them, the sales and remittances are to be made direct to us.

“ Invoice, &c., shipped by *Thompson* and *Mildred*, &c., per account of Mr. *J. Evans*’ sale and remittances in bills per appointment to *Thompson* and *Mildred*.”

“ We inclose invoice, &c., shipped, &c., for account of our friend Mr. *J. Evans*. They consist of, &c. The account sales and remittances for the same to be sent to us for account.

“ Invoice, &c., for account of Mr. *John Evans* of London. Sales and remittances in bills, per appointment to *Thompson* and *Mildred*.”

Distinct accounts were kept by *Thompson* and *Mildred* in their books of these adventures.

Before *Thompson* and *Mildred* or *Evans* stopped payment, the petitioners discounted these bills for *Evans* in the usual course of business, without any notice of the circumstances under which they were given, or of the lien which *Evans* possessed on the return proceeds of the shipments.

This was a petition by the holders of the bills, praying that distinct accounts of the above-mentioned shipments might be kept ; that the joint creditors of *Thompson*, *Mildred*, and *Evans* (if any), might prove and receive dividends, and that the surplus might be applied in payment of the petitioners, the bill holders ; and that

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of
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and others.

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 PAESCOTT
 and others.
 In the matter
 of
 THOMPSON
 and others.

the then surplus might be paid to the separate estates of *Thompson, Mildred, and Evans*.

Mr. *Montagu* and Mr. *Spence* for the petition :— The decision in the present case must follow that in *ex parte Copeland (a)*, unless the other side can distinguish the present from that case.

The CHIEF JUDGE :—

That is not so clear ; there may be a difference. The present is quite a distinct adventure, and the circumstances otherwise dissimilar. In this case the consignment was in the name of *Evans* alone, but the return proceeds were to be sent to *Thompson* and *Mildred*. In *ex parte Copeland (a)* the bill passed to *Powis* by virtue of an express contract which *Evans* was authorized to enter into ; in this case the petitioners have only an indirect lien through the equity of *Evans* ; so that the petitioner's claim must be postponed to those of all the joint creditors (if any), and a question may even arise whether he have any claim till after all the other creditors are paid.

The questions in the present case will be,

1st, Whether *Evans* and *Thompson* and *Mildred* were partners in this adventure ?

2d, What were the equities of *Evans* ? for such would be the equities of the petitioner.

Mr. *Anderdon* and Mr. *Heathfield* for the assignees of *Evans*.

Mr. *Swanston* for the assignees of *Thompson* and *Mildred* : —

(a) Reported in the 4th Number of *Mont. & Bli.* now in the press.

The legal interest was in *Thompson* and *Mildred*, any interest *Evans* possessed being purely equitable. But whatever equity *Evans* had, yet the petitioners have no equity in support of this petition.

Evans, it is alleged, was bound to renew the bills, but the petitioners were not bound by any such obligation. The drawers would not have been protected in an action by the bill-holders by *Evans's* contract to renew, though the drawers would be compelled to allow the goods to be bound by the contract with *Evans*. If the bill-holders were not subject to the liability of the contract to renew, they are not entitled to the benefits of the contract. The case of *ex parte Waring* (a) stands alone, and is no precedent on this occasion.

[The CHIEF JUDGE: — *Ex parte Parr*, *Buch*, 191, and *ex parte Perfect*, 1 *Mont.* 25, are similar cases.]

The equity of *Evans* is one personal to himself, and not transferrable to others. The bill-holders have their legal rights, and no more, because there was no notice, nor any contract between *Evans* and the bill-holders, which circumstances differ this case from *ex parte Copeland*, where there was such a contract.

[The CHIEF JUDGE: — Have not the bill-holders a right to insist on the bills being paid out of the proceeds of the consignment, instead of proving against *Evans* ?]

In equity the first question would be, where is the contract on which you, the bill-holders, found your equity? And if, when produced, it appeared that they were not bound by the contract, they would not be allowed the benefit of it. Such never has been allowed, except in the one extraordinary case of *ex parte Waring*.

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Ex parte
Prescott
and others.
In the matter
of
Thompson
and others.

(a) 2 *Rose*, 182; 19 *Ves.* 530. Note 3 a in *Montagu's* tract for 1821, page 51; and 2 *Gl. & J.* 404.

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Ex parte
 PRESCOTT
 and others.
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 of
 THOMPSON
 and others.

[The CHIEF JUDGE:— In *ex parte Perfect*, 1 *Mont.* 25, the main argument was the absence of contract; but that did not prevail.]

In *ex parte Waring* there was no obligation; the bankers had incurred none; but *Evans* clearly had incurred an obligation, which ought to have bound the bill-holders. This difference displaces *ex parte Waring* as an authority in this case.

Mr. *Montagu*, in reply, was stopped by the Court.

The CHIEF JUDGE:—

Looking at the whole of this case, and considering its circumstances, which are peculiar, the fact as to the partnership becomes unimportant. If this were a mere sale by *Evans*, on a pledge that the proceeds of the goods should be applied in payment of the bills, then *Evans*, whether a partner or not, would be entitled to have the bills paid out of the proceeds of such goods. The question then is, whether, granting that *Evans* had this right, the persons to whom *Evans* had transferred the bills, without notice of this right of *Evans*, possessed the same right as *Evans* himself of having the bills paid out of the proceeds. It appears to me that *ex parte Perfect*, 1 *Mont.* 25, is an authority that they had; that case is conclusive, even if there were no partnership. But, viewing the whole transaction in this case, the substance appears to be, that *Evans* was a partner. The only case in which partnership could make any difference would be, if there were other joint creditors besides those in this particular transaction; then the joint creditors of the three would first have been entitled to be satisfied. Here the only joint creditors were those under each individual transaction. On the whole, the circumstances of this case bring the parties within the reason of *ex parte*

Copeland. I cannot view the contract with *Evans* in any other light than as specifically rendering the proceeds liable, in the first instance, to the payment of the bills: this equity *Evans* possessed, and to this equity the bill-holders are entitled through *Evans*.

The order must be,

1st, To keep distinct accounts.

2d, The proceeds to be applied to pay the joint creditors of the ~~the~~ adventure.

3d, To pay the petitioners.

4th, The surplus, if any, carried over to each separate estate.

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—
Ex parte
PRESCOTT
and others.
In the matter
of
THOMPSON
and others.

Sir John Cross : —

It appears that, in the first instance, the goods were the property of *Evans*, who sold them to *Thompson* and *Mildred*, who undertook to pay for them, and who consequently were alone the owners; so much so, that *Evans* drew bills on them for the amount, which they accepted. Here the relation of vendor and purchaser ended, and a new state of circumstances arose, an agreement being entered into, by which *Evans* became entitled to half the profits, and liable to half the losses, and became entitled to be paid the amount of the bills out of the proceeds of the goods. As to the lien in respect of the bills, *Evans* says, "I undertake to renew them till the funds come round;" so that he was not entitled to be paid till the proceeds did come round.

Evans was not, however, compelled to renew, as he might have taken up the bills himself, but so doing would not have deprived him of his right to be repaid out of the proceeds. The question then is, did *Evans*, when he indorsed the bills, pass his lien with the in-

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Ex parte
PRESOTT
and others.
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THOMPSON
and others.

dorsement? It is admitted he did not do so expressly; there is nothing on the face of the bills to show that such lien existed, and the holders do not pretend to say, that at the time they understood such lien to have been intended to be passed. I therefore cannot comprehend how *Evans* passed a lien which he did not intend to transfer, and which the other party did not understand him to intend to do. So far as I comprehend the case, I am of opinion, that the assignees of *Evans* still possess the lien. Did the bills carry with them any obligation to renew? Were the bill-holders bound to renew? They were not; such is the distinction between this case and those of *ex parte Waring* (a) and *ex parte Perfect*. (b)

It therefore appears to me that the assignees of *Evans* are entitled to the proceeds, as I feel considerable doubts as to whether the bill-holders have established their lien; such is my present opinion, which, if the Court had taken further time to consider its judgment, perhaps I might have altered.

Sir George Rose: — The question of partnership is immaterial. The acceptors of the bills incurred liabilities, when the drawer of the bills indorsed them, he at the same time transferred his rights thereon, and his means of enforcing and satisfying them, and all his equities. Each transaction was a special partnership to be proceeded with as usual.

Ordered as prayed.

(a) 2 Rose, 182.

(b) Mont. 25.

Ex parte THWAITES. — In the matter of
KNOWLES.

C. of R.
Feb. 18,
1834.

THIS was a petition to confirm a purchase made by an assignee of the bankrupt's estate without leave.

The Court will not confirm a purchase of part of the bankrupt's estate made by an assignee without leave, because a meeting of creditors has consented.

Certain premises, part of the bankrupt's estate, were put up to sale in 1828, when *Baron* was declared purchaser. *Baron* bought on behalf of *Thwaites*, one of the assignees. Subsequently all the creditors who had proved, or their representatives, consented to the purchase, save one who died in Ireland, and whose representatives could not be discovered. After this purchase, an application was intended to have been made to the Court to confirm the sale, but before that was done, *Thwaites*, who was the surviving assignee, died. A new assignee was appointed, and consented to the prayer of this petition.

The creditors (save the one before mentioned) were of opinion that a more advantageous sale could not be made.

This was the petition of the legal personal representatives of *Thwaites*, praying that the sale might be confirmed, or that a reference might be made to the commissioners to certify whether, under the circumstances, the sale were a proper one.

Per Curiam. — The prayer of this petition cannot be granted. This Court will never thus interfere after a sale. You must proceed at your own risk. If, however, all the creditors have consented, who can upset the sale? (a)

(a) As to the rule that assignees *Lacy*, 6 *Ves.* 625; *ex parte Tanner*, *ex parte Attwood*, and *Owen Reynolds*, 5 *Ves.* 707; *ex parte v. Foulke*, in note to *ex parte*

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A firm composed of *A.* and *B.* may prove against a firm composed of *B.* and *C.*

Ex parte THOMPSON, one of the assignees. (a) —
In the matter of WILKS.

JOHN ECROYD and *James Ecroyd* were partners as grocers.

John Ecroyd entered into partnership with *James Wilks*, as nail manufacturers.

The firm of nail manufacturers was indebted to the grocers.

The grocers assigned their property, on the usual trusts, for payment of their debts.

A fiat issued against the nail manufacturers.

On a former occasion (2d July 1833) a petition was presented by the trustees for the creditors of the grocers, to prove under the fiat against the nail manufacturers.

The respondents did not appear.

Per Curiam : — Take such order as you can abide by.

The petitioners accordingly took an order to prove.

The present was a petition for a re-hearing, and to expunge the proof.

Mr. Swanston, for the proof, cited *ex parte Adams*, 1 *Rose*, 305; *ex parte Sillitoe*, 1 *Gl. & J.* 382; and *ex parte Cooke*, 1 *Mont.* 258.

Mr. Koe and *Mr. Sharpe*, *contra*.

Per Curiam : — It has been settled law for many years, that if *A.* and *B.* and *C.* are partners, *C.* cannot prove

Lacy, 6 *Ves.* 625; *ex parte James*, *parte Badcock*, *Mont. & Mac.* 8 *Ves.* 337; *ex parte Bennett*, 238.

10 *Ves.* 395; *ex parte Chadwicke*, (a) The other assignee refused 1 *Mont. & Gregg*, *Dig.* 349; *ex* to join in this petition.

under a joint commission against all; but that if *A.* and *B.* be partners, and *B.* and *C.* be partners, the two firms may prove against each other.

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Ex parte
THOMPSON.
In the matter
of
WILKS.

The proof ordered to stand. Petition for re-hearing dismissed. The respondents' costs out of the estate. No costs to petitioner.

In this case the following points of practice arose:

On the 2d of July, 1833, the petition was called on; when the respondents did not appear. The Court intimated what order it would be advisable for the petitioner to take, and finally—

When a petitioner, the respondent not appearing, takes such order as he can abide by, the other side may open the order any time within about six months.

Per Curiam:—Take such order as you can abide by.

The petitioners accordingly took an order to prove.

On the 8th of July 1833 Mr. *Koe*, for the respondents, applied that the order might be stayed and the petition be restored to the paper; the respondents were ignorant that the petition was in the paper; the solicitor sent a clerk to examine the list, but he overlooked the case.

Sir George Rose:—

This is an application to stay an order of the Court and to have the petition re-heard. When a party is desirous of a re-hearing, he must present a petition supported by affidavit, stating such circumstances as may induce the Court to think that if the matter be re-heard it is possible the Court may alter its order. Such has not been done in this case, and therefore the application cannot be entertained. When the petition was called on, the counsel for the petitioner was told

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Ex parte
THOMPSON.
 In the matter
 of
WILKS.

Restoring peti-
 tion to the
 paper.

to take such order as he could abide by. Whenever this is done it should be understood that the other party are at liberty to open the order at any time within six months, and to show that the petitioners had taken an order they could not abide by; that is done by a petition to vary the order.

This Court often allows a petition to be restored to the paper, when, through mistake, &c. the parties were ignorant that the petition was coming on; but this is not such a case. There were but five petitions in the paper, and the clerk, who was sent expressly to search, overlooked it; such carelessness must be visited on his employer.

And of this opinion were the rest of the Judges, and the application was refused.

Practice on
 petition of re-
 hearing.

This was a petition by *Thompson*, one of the assignees (a), praying for a re-hearing and that the proof already made under the order of the Court might be expunged.

Mr. *Swanston* objected that as this was a petition praying a re-hearing, an order ought first to have been obtained that it should be re-heard, and then it should be set down for re-hearing in pursuance of such order; but no such order had been obtained.

Per Curiam :— In bankruptcy, the petition for a re-hearing and the petition itself come on at the same time. The present petitioner must now proceed to satisfy the Court that this is a proper case to be re-heard.

(a) The other assignee refused to interfere.

Ex parte PEDDER and another, partners. In the
matter of HADWEN.

C. of R.
Feb. 20,
1884.

IN this case certain mortgaged property was put up to sale in the usual manner, on the application of the mortgagees. At the sale, finding that the estates were likely to sell for less than the value, the mortgagees bid, and were declared the purchasers; the petitioners stated they had not previously entertained any intention to bid, or they would have obtained an order for leave so to do.

A mortgagee having bid without leave, an order to bid *nunc pro tunc* was made.

This was a petition that the sale so made to them might be confirmed.

Mr. *Swanston* for the petition.

Mr. *Bethell*, for the assignees, submitted to any order the Court might make.

Per Curiam : —

It is quite clear the Court would have given leave to bid in the first instance; nevertheless, there is much difference between giving leave previous to a sale, and confirming subsequently.

The petitioners may however take an order to bid *nunc pro tunc*.

Leave to bid *nunc pro tunc*.

C. of R. *Ex parte* COATES and HAMMOND. — In the
Mar. 8 & 14, matter of WOODING.
 1834.

The Court can
 order the bill of
 costs subsequent
 to the choice to
 be paid, though
 the assignees
 have no assets
 in their hands.

Anon. Buck.
 475, over-ruled,
semble.

THIS was the petition of Messrs. *Coates* and *Hammond*, solicitors and copartners, for the amount of half the bill of costs subsequent to the choice of assignees.

The petitioners sued out the commission. After the assignees were chosen, they (the assignees) were about to displace Messrs. *Coates* and *Hammond* and substituted Mr. *Warburton* as solicitor; but, on the intervention of some of the creditors, the assignees agreed that all three (viz. Messrs. *Coates*, *Hammond*, and *Warburton*,) should jointly act and share the profits.

The petition stated that *Warburton* now claimed the whole of the profits, and that the assignees denied ever having retained Messrs. *Coates* and *Hammond*.

Mr. *Warburton* was served, but did not appear.

The facts of the case are more particularly detailed in the judgment of the Chief Judge.

Mr. *Foster* for the petition.

Mr. *Anderdon*, for the assignees, objected that there was no jurisdiction; *ex parte Haynes*, 1 Gl. & J. 35; *Burwood v. Felton*, 8 Barn. & Cres. 43.

Even if there were jurisdiction, yet the extraordinary power of this Court is not required to be called into action, as the petitioner can proceed at law, consequently he cannot petition here.

The foundation of the jurisdiction on these occasions is, that they are connected with the distribution of the estate; but there are no assets in this case in the hands of the assignees, consequently there is no jurisdiction.

Mr. *Foster*, in reply : —

As to jurisdiction, *ex parte Hartopp*, 1 *Rose*, 449 ; *ex parte Johnson*, 1 *Gl. & J.* 23 ; and many other cases, clearly prove that the Court will interfere between its officers, though they may have remedies against each other at law.

The argument that the assignees are not liable because they have no funds of the bankrupt's in their hands is of no validity.

Curia advisare vult.

The CHIEF JUDGE : —

This was an application by Messrs. *Coates* and *Hammond* for an order directing the assignees of *Wooding*, a bankrupt, to pay to them and Mr. *Peter Warburton* the sum of 67*l.* 19*s.* 7*d.* due to them as joint solicitors under the commission, for costs incurred since the choice of assignees ; and further praying that 57*l.* 3*s.* 3*d.* part of that sum, may be paid to the petitioners.

The petition alleges, that the petitioners sued out the commission as solicitors to the petitioning creditors ; that *Thomas Denham* and *Nathaniel Derry* were chosen assignees, who were about to nominate Mr. *Warburton* as their solicitor, when, through the intervention of other creditors who wished the petitioners to continue as solicitors to the commission, an arrangement was made, to which the assignees were parties, that the petitioners and *Warburton* should jointly act as the solicitors to the commission, and share the profits from the beginning ; that, in pursuance of such agreement, the petitioners paid to Mr. *Warburton* one half of the profits made prior to the choice of assignees, and continued to act in conjunction with Mr. *Warburton* as the solicitors under the commission, and in that character attended the meetings

1834.

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Ex parte
COATES
and another.
In the matter
of
WOODING.

March 14.

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Ex parte
COATES
and another.
In the matter
of
WOODING.

and advanced monies for the necessary expences of the commission to the amount of 46*l*.

The petition further stated, that a bill to the amount of 88*l*. 18*s*. 1*d*. was afterwards delivered in the joint names of the three solicitors, which was settled by the commissioners, and reduced to the sum of 67*l*. 19*s*. 7*d*. of which 46*l*. 6*s*. 11*d*. advanced by the petitioners, formed a part.

The petitioners therefore claim the repayment of that sum, and one half of the profits, making in the whole the sum of 57*l*. 3*s*. 3*d*. leaving the other half of the profits for Mr. *Warburton*, according to the agreement.

Mr. *Warburton*, though served, did not appear to oppose the petition. The assignees, in their affidavits and by their counsel, denied the fact of the retainer; they denied their liability beyond the amount of funds in their hands amounting to 6*l*.; and they further denied the jurisdiction of this Court to enforce that liability if it existed. As to the retainer, they say they appointed *Warburton* as their solicitor, and positively deny that they ever appointed the petitioners, or made any arrangement or agreement with them, or in any way authorized them to act as their solicitors, or ever consulted them as to proceedings under the same, or relating thereto. Here, then, the parties are directly at issue as to the retainer, and yet, perhaps, more so as to the conclusion to be drawn from the facts, than as to the circumstances themselves. For the respondents admit that an agreement was made at the meeting between the solicitors for sharing the profits under the commission; they do not deny their privity to, and acquiescence in, such an arrangement; they do not deny the fact of the attendance of the petitioners at the meetings, performing the functions of solicitors to the commission; they do not ques-

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solicitor.

tion the fact of the advance by the petitioners of the sums charged for the expences of the meetings, nor do they deny the delivery of the bill in their joint names, and its taxation and allowance in that form ; and therefore it becomes a question not of veracity but of construction, whether, under all the circumstances, the assignees have made themselves responsible to Mr. *Warburton* only, or to Mr. *Warburton* and the petitioners jointly, as solicitors under the commission ? If there had been no express appointment of Mr. *Warburton* as their solicitor, the mere circumstance of their solicitor who took out the commission continuing to act as their solicitor under the commission, with the privity and knowledge of the assignees, would have been sufficient evidence of employment by them as such ; *Tarn v. Keys, Holt*, N. P. 378 (n) ; S. C. 1 *Stark*, N. P. C. 178. Then, if having appointed *Warburton* as their solicitor, he, with their privity and acquiescence, entered into the agreement as stated in the petition, and they, knowing of this agreement, permit the petitioners to act as joint solicitors, to advance their own monies for the expences, and when the bill is delivered in the joint names of the three, make no objection except as to the amount, and allow it to be taxed and filed with the proceedings in that form, can any other conclusion be fairly drawn than that the assignees have recognized the petitioners as jointly employed with Mr. *Warburton* ?

A careful examination of the affidavits has satisfied my mind upon this point, and the only doubt I have entertained upon this part of the case has been, whether we ought to decide the question, or leave the parties to their ordinary remedy at law. Looking, however, at the substantial merits of the case, and seeing that the assignees do not pretend that they have paid Mr. *War-*

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burton, or that they have any set-off against him; that Mr. *Warburton* does not deny the right of the petitioners to the share they claim; and that the only substantial question raised by the assignees is, whether they are liable beyond the funds in hand? I think it is due in justice to all parties that we should save them from the expence of further litigation, if we have jurisdiction so to do. Without referring to any authorities, but regarding the question as one arising in the bankruptcy between two sets of officers engaged in prosecuting the commission relative to the payment of the expences of working it, I should have entertained no doubt of the jurisdiction of this Court to decide it. Two cases were cited by the counsel for the assignees, an anonymous case, reported by Mr. *Buck*, 475, and *ex parte Haynes*, 1 Gl. & J. 35. The latter case does not affect this question, because the point there decided was, that the petitioning creditor, and not the solicitor, ought to be the party applying for the order on the assignees to pay the costs incurred prior to the choice of assignees, whereas the costs now in dispute are costs subsequent to the choice. The first case, however, from *Buck's* reports, in which the Vice-Chancellor is reported to have disclaimed any jurisdiction to compel the petitioning creditor to pay the solicitor his bill, seemed to demand further consideration, though that case struck me as being at variance with those cases in which the Chancellor had interfered in favour of the messenger; and upon further consideration, I find no principle upon which the claim of the solicitor should be referred to a court of common law which would not equally apply to the messenger's bill; and yet, in the cases of *ex parte Clarke* and *Cogan*, Cook, B. L. 17; *ex parte Johnson*, 1 Gl. & J. 23; *ex parte Burwood*, 2 Gl. & J. 70, the claims of the

messenger have been enforced by orders in bankruptcy; and in the case *ex parte Hartop*, 1 *Rose*, 450, Lord *Eldon* illustrates the power of the Court to interfere on behalf of the messenger, by what he seems to consider its unquestionable jurisdiction in behalf of the solicitor. His Lordships words are: "The petitioning creditor is liable to the solicitor for the expences of conducting the commission up to the choice of assignees; although the solicitor may maintain an action against him for his bill of costs, yet this Court would not hesitate, upon petition, to make an order upon him for the payment of it." And the Learned Judge, who is reported to have decided the contrary in the case in *Mr. Buck's* reports above alluded to (a), would at once, in the case of *ex parte Haynes* (b), have dismissed the petition if he had entertained the opinion attributed to him in the first case.

I cannot, therefore, consider the authority of that case, so imperfectly reported, sufficient to outweigh the other cases, which, though not so directly in point, all strongly lead to an opposite conclusion. But the respondents say they are only liable to the amount of assets in their hands, which, as they allege, do not exceed 6*l.*; but in this, I think, they are equally unsupported by principle or precedent. The claim of the solicitor does not depend upon the contingency of the assignees procuring funds from the bankrupt's estate, but, like that of the messenger, rests upon their employment by the assignees; and both at law and in bankruptcy their liability to the messenger has been decided to be wholly independent of the state of the funds; and the principle of those decisions applies with equal force to solicitors. It is enough,

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Anon. *Buck.*
475, over-ruled,
semble.

(a) *Buck*, 475.

(b) 1 *Gl. & J.* 35.

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upon this point, to refer to the cases of *Tarn v. Keys, Holt*, 378 (n), S. C. 1 *Stark*. 278; *Hart v. Beggs, Holt*, 245; *ex parte Hartop*, 9 *Ves.* 109; *ex parte Johnson*, 1 *Gl. & J.* 23. Being satisfied, upon the facts, that there was enough to constitute a joint employment of the three as solicitors under the commission, and that the assignees are liable to pay the amount of their bill of costs, whether they have funds in their hands or not, and that this Court has jurisdiction to enforce the payment upon petition, and further, that it is mercy to all parties to exercise that jurisdiction on this occasion, I am of opinion that the petitioners ought to take an order, declaring them and Mr. *Warburton* to have been jointly employed by the assignees as solicitors under the commission, and that there is due to them as solicitors the sum of 67*l.* 19*s.* 7*d.* (or, if it be wished, let it be referred to Mr. *Gregg* to ascertain the amount,) and directing the assignees to pay the amount to the joint order of the petitioners and Mr. *Warburton*, and if they cannot agree, then let them pay the money into court, with liberty for either party to apply.

Mr. *Anderdon*, for the assignees, having declared the intention of his clients forthwith to comply with the order of the Court, without further taxation, the order was made for the payments as above, and if no demand for the payment were made before the first day of term, the money to be paid into court.

Ordered accordingly.

Ex parte TATHAM.—In the matter of SHEPPARD.

C. of R.
March 5,
1833.

MR. PHILLIMORE:—This is a petition by a mortgagee for leave to bid at the sale of the mortgaged premises, and that he may not be required to pay any deposit.

The Court will not exempt a mortgagee who bids from paying a deposit.

Mr. Ayrton, for the assignees, submitted to any order the Court might make.

Per Curiam:—The Court will not make any order as to the deposit; a similar application has been before refused.

Ex parte EVANS.—In the matter of DODGSON.

C. of R.
March 5,
1833.

THIS was the petition of the creditor's assignees, and stated that the bankrupt being entitled to certain residuary property, they (the assignees) were about to institute a suit against the executors for the same, with consent of the creditors; but that *William Turquand*, the official assignee, declined to join in the suit, unless the solicitor to the petitioners would expressly undertake not to consider him responsible for costs, and unless the petitioners indemnified him from all costs. The petition prayed that *W. Turquand* might be ordered to join in the intended suit as co-plaintiff, or, if he should decline, that he might be removed from being official assignee.

The Court will not compel the official assignee to join the other assignees in a suit. If he improperly refuse to join, and is made defendant, he may have to pay his own costs.

Mr. Swanston and Mr. Purvis for the petition:—

By the 1 & 2 W. 4. c. 56. s. 22. the estate is as completely vested in the official assignee as the other

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assignees, and he is in all respects in the same situation as they are, except that section 23 enacts, "that nothing herein contained shall extend to authorize any such official assignee to interfere with the assignees chosen by the creditors, in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estates or effects." On all other occasions, and especially as regards suits and actions, the official assignee is precisely in the same situation, and incurs the same liabilities, as the other assignees; as was decided in *Munk v. Clarke*, 10 Bing. 102.

[Sir George Rose: — That case is cited in order to establish the position, that the official assignee is liable to an action, and therefore resembles the other assignees. It is conceded by the other side, as the fact is, that for all such purposes as actions, and as regards all circumstances of property, the official assignee is precisely in the same situation as other assignees.]

The official assignee is a necessary party to all proceedings, and the other assignees can no more proceed without him than he could without them. He is a paid officer, and why is he not to participate in the responsibilities in which the other assignees are involved, though unpaid?

An action at law or a suit in equity cannot be carried on unless all the assignees be parties. If a person institute a suit, and become bankrupt, the assignees may carry it on, *Sharp v. Hullett*, 2 Sim. & Stu. 496; and if they allow a suit to abate which ought to be continued, they would be liable to the creditors for the consequences; but if a necessary party may refuse to join, is it possible for them to carry on the suit?

If the suit in question be one which ought to be prosecuted, and the assignees allow the bill to be dismissed,

they would be liable to the creditors, as for what, without wilful default, they might have received, *Lingard v. Bromley*, 1 Ves. & B. 114; and the official assignee must bear his proportion of the loss. It is the duty of the official assignee to join: if so, what right has he to require an indemnity?

No case can be cited in which one trustee was successful in requiring an indemnity from a co-trustee, in relation to carrying on a suit, though on some occasions an indemnity from the *cestui que trust* may be insisted on; but the official assignee does not ask for an indemnity from the creditors.

Before the Lord Chancellor, the constant practice was to order assignees to join in proper suits, or to remove them. This great difference exists between assignees and other trustees, that if the latter will not join in a suit as plaintiffs, they may be made defendants; but it would be wrong in assignees of an insolvent estate to burthen it with the costs necessarily attendant on making the official assignee a defendant.

It is contended that all assignees must join, as they all make but one plaintiff; and that if two out of three were to institute a suit, making the third a nominal defendant, the real defendant might demur, on the ground that the character of plaintiff was not complete. The assignees sue as trustees, which character is vested in them all, not in any one or two, out of a greater number. No instance can be produced where an assignee was made a defendant by his co-assignees, such being contrary to the rule of practice.

Suppose that an assignee, having instituted a suit and having made the official assignee a defendant, were to die, what course could be pursued? If all the trustees, plaintiffs in a suit, were to die, the Court could appoint new ones to continue the suit, but would not

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appoint new assignees, because the official assignee, who would represent the creditors, would already be before the Court as defendant; so that if he declined to carry on the suit it must abate, and the expence be saddled on the creditors.

Mr. *Bethell*, for the official assignee, was stopped by the Court.

The CHIEF JUDGE: — The object of the present petition is to compel the official assignee to join the other assignees in instituting a suit in equity, or to remove him: the official assignee offers to join, on having an indemnity, which is refused. If it had been shown that his joining as a plaintiff were essential to the suit, and the suit beneficial (which this is conceded to be), the Court would not have permitted him to stand in the way of the suit, but would have ordered him to be removed. But his not being a plaintiff will in no way interfere with the success of a suit in equity, although in law it is essential that he should join as co-plaintiff. No authority has been cited for the proposition that a suit in equity will be defeated by one assignee not being made a co-plaintiff. If in this case the assignees, after having made the official assignee a defendant, succeed in the suit, and thus prove that it was proper to be instituted, the official assignee may have to answer the consequences of refusing to join, by being compelled to bear his own costs. On this petition the Court will not interfere.

If an official assignee refuse to join in a proper suit, and is made a defendant, he may have to bear the costs.

Sir *John Cross*: —

It has been contended that the rights and duties of the different assignees are identical in all respects; such is not the case. They are indeed joint owners of the

property; but one class are public officers of a court of justice; the other class are private persons, whose duties are confirmed to one particular bankruptcy.

When a suit is to be instituted, the creditors' assignees alone have any voice in the election of a solicitor to conduct the suit; and all the official assignee says in this case is, "it is no part of my duty, as a public officer, to incur the risk of costs in a suit so conducted."

The law is tender of forcing the responsibility of its public officers, who otherwise might be ruined by events over which they have no control. In consideration of this, the commissioners, and the messengers, and all officers and servants connected with the commission, were formerly indemnified by the assignees by a covenant in the bargain and sale. I ground my opinion, that this petition ought to be dismissed, on the circumstance that the creditors' assignees alone set the solicitor in motion who is to institute the suit, and as the official assignee is not permitted to choose the solicitor, so he ought not to be compelled to join in the suit, and be bound to the consequences of the proceedings of such solicitor. If we were to accede to the prayer of this petition, and remove the official assignee, then the petitioners would conduct the suit alone, consequently they would be in the same situation as they now are.

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Sir George Rose: —

The proposition is, that the official assignee is to be compelled to join whether willing or unwilling. In the late case of *ex parte Tiplady* (a), what would have been considered an adequate remuneration if it had been suggested that official assignees and their repre-

(a) *Ante*, p. 161.

1834. sentatives were liable to be dragged into Chancery suits?

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In the case of several trustees, a suit would not fail because some were not plaintiffs, provided they were made defendants.

It must not, however, be supposed, that an official assignee has any right so to conduct himself as to embarrass the other assignees in the regular pursuit of proper litigation. In any case in which, owing to his having unnecessarily or improperly insisted on an indemnity, the assignees have been compelled to make him a defendant, the question as to which party was to bear the costs would be a proper one for this Court to entertain; and if he acted improperly, and embarrassed the other assignees, we should not allow him the costs out of the bankrupt's estate, which salutary power gives the Court quite sufficient control over official assignees in questions of this nature.

In my opinion it would have been much better if the official assignees had not been vested with any interest in the bankrupt's estate. In that case they would have been (what they now are) most useful officers, freed (which they now are not) from all questions of pleading which arise in cases like the present.

Petition dismissed. Costs of both parties out of the estate.

Ex parte GUDGE. — In the matter of GUDGE.

C. of R.
March 5,
1831.

THE commission issued on the 23d May 1831; the adjudication was on the 2d of June. On the 16th July (being the forty-second day) the bankrupt being unable to attend through illness, his examination was adjourned till the 16th of August, when he surrendered; but his accounts not being prepared, his examination was again adjourned till the 19th of August, on which day, for the same reason, a further adjournment took place to the 30th of September, when, being still unprepared, the examination was adjourned *sine die*.

The Court will supersede where all the creditors consent, and the bankrupt has paid 20s. in the pound, though his examination has been adjourned *sine die*.

Subsequently the bankrupt paid all his creditors 20s. in the pound. This was a petition by the bankrupt for a supersedeas, to which all the creditors consented.

The CHIEF JUDGE: — As the bankrupt did not surrender on the forty-second day, and has not yet passed his last examination, which is adjourned *sine die*, we ought not to supersede till we have ascertained from the commissioner whether this adjournment *sine die* were through any default or misconduct on the part of the bankrupt.

Sir George Rose: — The reason of the repeated adjournments being unexplained, we cannot but presume, in the absence of evidence the other way, that the examination was not satisfactory to the commissioner. It would be highly mischievous to allow a supersedeas by persuading or buying off the creditors, who have proved, to consent when the last examination is not passed, at which other creditors might come in and prove.

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Ex parte Norcutt, Mont. 281, is an authority for the present application, the last examination having been there adjourned *sine die*. But no authority is necessary; for even if the bankrupt be in custody for not answering to the satisfaction of the commissioners, yet he is entitled to supersede, on consent of all the creditors. *Ex parte Magennis, 1 Rose, 60, S. C. nom. M'Gennis, 18 Ves. 289; ex parte Brown, 2 Swan. 290.* And an adjournment *sine die*, whatever may have been the cause of it, cannot manifest such disapprobation on the part of the commissioners as a commitment.

Sir George Rose: — In *ex parte Norcutt* (a) it does not appear that the fact of the adjournment *sine die* was mentioned to the Court (b), the only point called to its attention being the non-surrender on the forty-second day. In *ex parte Magennis* (c) the party insisted he was not a bankrupt; so that his supersedeas, under the circumstances of that case, was matter of right. Not so here.

Curia advisare vult.

March 15. This day the Court ordered the supersedeas to issue. The proceedings were produced, and they did not state why the examination was adjourned.

(a) *Mont.* 281.

and was not mentioned to the

(b) Having been counsel in Court.—*S. Ayrton.*
 that case, I am enabled to state, (c) *1 Rose, 60; S. C. 18 Ves.*
 that the fact of the adjourn- 289.
 ment *sine die* escaped my notice,

Ex parte DALY. — In the matter of DALY.

C. of R.
March 14,
1834.

THIS was a petition to supersede for want of an act of bankruptcy and petitioning creditor's debt.

On the application of the bankrupt it was advanced, and heard much sooner than it could have been in ordinary course.

The bankrupt may petition to supersede, without undertaking not to bring actions.

Mr. *Swanston* for the petitioner.

Per Curiam : — You must either undertake not to bring an action in case you do not succeed on this petition, or amend your petition by praying a reversal of the adjudication. A similar undertaking was required in *ex parte Pownal*. (a)

Sir *John Cross* : — It is not a question now before the Court, but I do not think it should be taken for granted, or admitted, that after this Court, which is one of record, has refused a supersedeas, the bankrupt can maintain any action, the object of which is to upset his commission.

Mr. *Swanston* : — In *Pownall's* case I felt no objection to undertake, Mr. *Pownall* being in Court, and authorizing it to be done; but I contend that the Court has no right to impose the terms proposed. The party comes here to ascertain whether the fiat be a legal or an illegal process, and not to be put on terms.

Sir *George Rose* : — I do not think the Court have any right directly to restrain a bankrupt, except so far as to put him to his election when he comes here to

(a) *Ante*, page 314.

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supersede, and brings an action at the same time. (a) Though the Court have no power directly, yet it might be thought that same thing might be accomplished by indirect means, as formerly was done by simply retaining the petition, and leaving the bankrupt to bring an action. In the present case, as the petition would not, in ordinary course, have been heard till next term, we might order it, at any rate, to stand over till it came on in regular course, if the bankrupt refused to give the required undertaking. But I do not think we ought to do that indirectly, which we cannot accomplish by direct means. I am of opinion that a bankrupt petitioning to supersede is entitled to be heard *instantly*.

Sir *John Cross* : — The bankrupt applied to speed the hearing, on the ground that it could be no prejudice to the petitioning creditor, who must be prepared at all times to support the adjudication; but the bankrupt does not pray the reversal of the adjudication under section 17 (b); he asks a supersedeas generally.

Sir *George Rose* : — I cannot well understand the intent of the legislature as to the 17th clause. If I were a bankrupt, I certainly never should petition under that section.

The Court here called on Mr. *Swanston* to proceed, without requiring him to enter into any undertaking.

(a) See *ex parte Davy*, ante, page 299.

(b) 1 & 2 W. 4. c. 56.

Ex parte CHEVALIER.—In the matter of
VANZELLER.

L. C.
March 22
& 27,
1834.

THIS was an appeal from *ex parte* Turner, Mont. & Bl. 93, on the following

Ex parte Turner, Mont. & Bl. 90, confirmed.

SPECIAL CASE.

Before and at the respective times the three bills of exchange, amounting together to 4,300*l.*, were drawn and accepted as herein-after mentioned, *Vanzeller* carried on business as a merchant at Bahia, in the Brazils, in partnership with *Amando* and *Maubinson*, under the firm of *Vanzeller* and Co.

A firm abroad drew bills on one of its own partners, trading on his own account in England, payable to an agent of the foreign government. The bills were not paid. Process of insolvency issued against the foreign firm, and a commission against the English partner. Held, the agent may prove under the commission, but will be restrained from receiving dividends, unless he elect not to prove under the insolvency abroad.

Vanzeller also carried on the business of a merchant in London on his sole and separate account.

Early in 1830 the Junta de Casa da Fazenda, or Board of Finance of the Empire of Brazils at Bahia, had occasion to remit money to England for the use of the government of the Brazils; and, for the purpose of effecting such remittance, the Board of Finance applied to and requested *Vanzeller* and Co. to supply them with bills of exchange drawn on London.

In compliance with such application, the firm of *Vanzeller* and Co. at Bahia drew divers bills of exchange, amounting together to 10,300*l.* sterling, on *Vanzeller* in London, payable to the order of the Treasurer of the Board of Finance, and delivered the same to the treasurer, who thereupon paid to *Vanzeller* and Co. the full value of the bills.

Amongst these bills, were a bill of exchange, dated the 15th of April 1830, for 1,000*l.*, payable at sixty days after sight to the order of the Treasurer of the Board of Finance; another bill of exchange, dated the 30th April 1830, for 2,000*l.*, payable sixty days after

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sight to the order of the Treasurer of the Board of Finance; and another bill of exchange, dated the 4th of May 1830, for 1,300*l.*, payable sixty days after sight to the Treasurer of the Board of Finance.

These three bills were indorsed by the Treasurer of the Board of Finance, and remitted to the *Chevalier de Mello Mattos*, the Chargé d'Affaires of the Brazilian government in London, for the purpose of constituting him legal holder thereof, in order that he might, on behalf of the government of the Brazils, obtain the amounts payable thereon.

The three bills were duly presented to *Vanzeller*, and were duly accepted by him on the 6th of July 1830.

The rest of the bills of exchange, amounting to 6,000*l.*, which had been drawn by the firm of *Vanzeller* and Co. in Bahia, on *Vanzeller* in London, payable to the order of the Treasurer of the Board of Finance, were indorsed by the treasurer, and remitted to London for acceptance by *Vanzeller*, and were duly presented to him for acceptance; but he did not accept them, and they were returned dishonoured to the Brazilian government.

In the early part of the year 1830, the said Board of Finance, on the part of the Brazilian government, were the holders of other bills of exchange, amounting together to about 30,000*l.* sterling, for which they had paid full value, and which were also drawn by the firm of *Vanzeller* and Co. at Bahia on *Vanzeller* in London. These bills were also remitted to this country, and duly presented to *Vanzeller* for acceptance. One of such bills, for 4,178*l.*, was accepted; the rest were dishonoured, and returned to the Brazilian government.

On the 3d of November 1830 the firm of *Vanzeller* and Co. at Bahia stopped payment, and thereupon proceedings of insolvency, according to the law of the Brazils, were taken against them, and *Miller, Winheim*,

and *Lama* were appointed trustees or administrators of the estate and effects of the firm for the benefit of the creditors, according to the laws of the Brazils.

By a decree of the proper court of justice at Bahia, bearing date the 8th of November 1830, made upon the application of the before-mentioned Board of Finance of the government of the Brazils, the goods of the firm of *Vanzeller* and Co. were ordered to be seized and sequestered to the amount of 40,508*l.*, in satisfaction of a debt claimed to be owing to the Brazilian government from *Vanzeller* and Co.; and, in pursuance of such decree, goods in the possession of *Vanzeller* and Co. were sequestered and seized by the officers of the court of justice at Bahia, for the benefit of the Brazilian government. The debt claimed to be due to the Brazilian government from *Vanzeller* and Co., in respect of which the sequestration issued, consisted of the bills of exchange herein-before mentioned to have been drawn by the firm of *Vanzeller* and Co. at Bahia upon and accepted by *Vanzeller* in London, including the three bills of exchange, which amounted together to 4,300*l.*, and the bill of exchange for 4,178*l.*, and also the other bills which were dishonoured by *Vanzeller*.

Upon the issuing of the sequestration, the trustees or administrators of the estate and effects of the firm of *Vanzeller* and Co., jointly with *Vanzeller*, who was then at the Brazils, presented their petition to the proper courts at the Brazils, praying that the sequestration might be removed.

After the issuing of the sequestration the Brazilian government received payment of several of the said bills of exchange, and by a decree of the proper courts of the Brazils the sequestration was reduced to 12,716*l.*, which sum was ordered to be raised by a sale of the sequestered goods.

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1834. On the 29th of July 1831 a commission of bankruptcy was issued against *Vanzeller* in England, under which he was declared a bankrupt, and *Cotesworth*, *Buxton*, and *Hart* were chosen assignees, and the usual conveyances made to them.

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On the 6th of December 1831 the *Chevalier de Mello Mattos*, as holder of the three bills of exchange, amounting together to 4,300*l.*, was admitted to prove for 4,490*l.* (the amount of the bills and interest), *Vanzeller* being then in London.

In January 1832 a dividend of 2*s.* in the pound was declared on the separate estate of *Vanzeller* in England, and the *Chevalier de Mello Mattos* applied for payment of such dividend on his proof, which was refused on the grounds stated in the petition herein-after mentioned.

On the 21st of February 1832 a petition was presented to the Court of Review by the assignees of *Vanzeller*, stating, among other things, that the goods which had been sequestered by the government of the Brazils had been retained by the said government, in order that the same might be sold to satisfy their debt, and that the same were much more than sufficient to satisfy all the demands of the government against the firm of *Vanzeller* and Co., and against *Vanzeller*, including the debt or sum of 4,490*l.*, proved as aforesaid, and praying that the proof of the said debt of 4,490*l.* might be expunged, and the *Chevalier de Mello Mattos* pay the costs of the petition.

On the 1st of March 1832 the petition was heard, when the Court ordered that payment of the dividend should be stayed for six months, and until the further order of the Court, with liberty for either party to apply, and reserved the costs.

After the date of the last-mentioned order the facts

herein-after stated were ascertained by means of inquiries made at the Brazils.

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The right of the Brazilian governments to maintain the sequestration was disputed by the trustees and administrators of the estate and effects of the firm of *Vanzeller* and Co. at Bahia, and it being found that the operation of collecting the assets of the firm was impeded by the sequestration, an arrangement was come to between the government and the trustees, by which it was agreed that the sequestration should be withdrawn, and that a fourth trustee, to act on behalf of the government of the Brazils, jointly with the above-named trustees and administrators, should be appointed, without prejudice to the claim of the Brazilian government, to have the benefit of the sequestration, if lawfully entitled thereto, the decision respecting which was expressly reserved for the decision of the proper tribunals of the country.

In pursuance of the above arrangements a fourth trustee was appointed, and thereupon the sequestration was withdrawn, and the four trustees took possession of all the goods and effects belonging to the insolvent firm of *Vanzeller* and Co.

The government of the Brazils have received the sum of 100*l.*, or thereabouts, under the sequestration, being the proceeds of certain casks of sugar, which, being perishable, were sold, and the amount was received by them generally on account of their total debt, and not in satisfaction of any particular part thereof.

The sum of 8,478*l.*, being the amount of the three bills of exchange and interest, and the bill of exchange for 4,178*l.* with interest, remained due to the Brazilian government in respect of their original debt, excluding the said sum of about 100*l.*

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The Brazilian government have at all times insisted on their right to be paid the full amount of their demand in priority over the other creditors of *Vanzeller* and Co., which right remains to be decided by the proper tribunals at the Brazils.

According to the process of law in the Brazils, a long space of time, probably two years from the 9th of December 1832, will elapse before this right will be determined.

On the 23d of January 1833, after the before-mentioned information had been obtained from the Brazils, a motion was made, on the part of the Brazilian government, before the Court of Review, that the aforesaid order, made on the hearing of the petition of the assignees of *Vanzeller*, on the 1st of March 1832, should be discharged, and that the petition should be dismissed with costs, and that the Court would order that the said assignees should forthwith pay to the *Chevalier de Mello Mattos* the amount of the dividends declared on the proof made by him.

By an order of the Court, bearing date the 23d of January 1833, and made in the matter of the petition of the assignees, and upon the said motion, it was declared, that the holder of the three bills of exchange was not entitled to participate in the general administration of the insolvent firm abroad, and to receive a dividend upon the proof made here, but must elect as between the two estates; and it was ordered, that the injunction granted, restraining the receiving the dividends upon such proof, be continued until the further order of the Court; and the Court reserved all further directions and costs of the petition and motion, with liberty for the parties, or any of them, to apply to the Court.

Under the above circumstances, the Brazilian government contends, that it is entitled at once to receive the dividends now payable under the commission against *Vanzeller*, without being required to make such election as in the order of the 23d of January 1833 is mentioned, and without any restriction whatever.

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The question is, whether the Brazilian government be so entitled or not ?

Settled and approved, November 7, 1833.

T. ERSKINE, C. J.

Mr. *Wigram* and Mr. *G. Richards* for the appellants :—

The appellants claim the full benefit of the sequestrations at Bahia as a security for their debt, in priority over the other creditors of the insolvents there; and also to prove under the commission in this country, not receiving more in the whole, through the sequestration and proof together, than the amount of their debt and interest. The Court of Review was of opinion that the appellants would not be entitled to receive a dividend under the commission here and also under the insolvency at Bahia, and to prevent the appellants from doing so the order now complained of was made.

In *ex parte Moul*, 1 *Mont.* 321.; S. C. 1 *Dea. & Ch.* 44, the right of a bill holder to prove against different firms, and whether he must elect, was much discussed; but the Court being equally divided, no decision was given on the point. In *ex parte Parr*, 1 *Rose*, 76, Lord *Eldon* said, “ The deduction of a security is never to be made in bankruptcy, but where it is the property of the bankrupt; it is said that it must be so considered in this

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case; but it is quite familiar that the same firm may in one character be drawers, and in another acceptors." And in *ex parte Peacock*, 2 Gl. & J. 76, it was expressly decided that a joint creditor, having a separate security, may prove against the joint estate and retain his separate security.

The question therefore is, whether, putting the sequestration out of the question, we have not a right to prove under the commission here, and also under the general insolvency abroad? We have proved here, and we claim the dividend payable in respect of that proof. This is a legal right, and we contend that the Court of Review has done wrong in applying its equitable jurisdiction to restrain us from the enjoyment of that legal right.

The case of the appellants rests on three propositions:—

1st. The right to proof against both estates should be determined by the foreign law.

2d. That *ex parte Mout* does not apply.

3d. If the first and second points fail, yet the appellants ought not now to be restrained from receiving the dividends due.

First. It is a proposition not to be disputed, that *primâ facie*, the *lex loci contractûs* regulates the rights of the parties contracting. In this case, the contract was made abroad, for though the bill was accepted in this country, yet the acceptance was merely the completion of the contract made at Bahia. Suppose *Vanzeller* in this country to have refused to accept the bills, against whom would the action for breach of contract have lain? Clearly not against him, but against the drawers of the bills at Bahia. The circumstance of there being a bill creates no difference. In *Bayley on Bills*, page 77, *et seq.* edit. 5, are several cases, all showing that the

character of a bill, that is whether foreign or not, is determined by the place where it is drawn.

Second. The law which is recognized in *ex parte Mout, Mont.* 321, is an arbitrary rule, the principles of which no one pretends to understand; and the doctrine of that case cannot be extended beyond the letter of the rule there laid down, and which is confined to cases of several commissions in this country. The rule will not apply to this case, where there is a bankruptcy in England, and an insolvency in Bahia, the nature of the process under which is not known.

Third. The appellant has a present legal right to his dividend as consequential to his proof, but the Court of Review conceived there existed equitable grounds for the restraint of that right; but courts of equity never interfere to restrain a legal right, unless the party has actually done, or has threatened to do some wrong. If English law govern this case, and if that law deny the appellants the right to prove both here and abroad, the assignees have the remedy in their own hands, by resisting the proof abroad, on the ground of the proof already made in this country. But the proper time to raise that question will be when the attempt to make such second proof is made. The present injunction is a present wrong.

If bankruptcy had not intervened, the appellants could have enforced their legal rights against both estates. Where there are two bankruptcies, a proof made under one prevents a subsequent proof under the other, because the Court has a general jurisdiction over the creditor, and can guarantee him his dividend under the first bankruptcy; but when a creditor comes to prove under the first commission, the Court never was known to put him on terms not to prove under the second. In this case the proof is under a commission in this country; if the

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appellants think fit to go abroad and to prove under any commission there, what court in this country has any jurisdiction to prevent their so doing?

Perhaps the foreign court may have power to do this, but not the Court of Review. Suppose this were held a case for election, and we thereupon elected not to prove here, could the Court of Review guarantee our proof abroad?

[LORD CHANCELLOR: — I recollect a Scotch case, where a person made a disposition (equivalent to an English will) of real property in England and in Scotland, not attested so as to satisfy the terms of the English statute of frauds, and the Court of Session, though it had no jurisdiction as to the lands in England, yet said, you shall not take these Scotch lands over which we have jurisdiction, and it was ultimately held they had power to say so.]

The creditor is never prevented from making his first proof, it is the second proof which is stopped.

The rule in bankruptcy is not to allow two proofs on one fund; but in the present case, the Court of Review declare, you shall not receive a dividend on one fund which is certain, lest you should endeavour to obtain a dividend out of another fund, which is at present uncertain.

In *ex parte Moul*, *Mont.* 321, the Court had power over both funds; here, the appellant could not be prevented from proving abroad if he thought fit, and consequently he cannot be restrained from receiving his dividends under the proof made in this country.

Mr. *Swanston*, for the respondents: —

The order appealed against is merely precautionary, and does not affect the rights of the parties. It has been argued as if a sequestration resembled a security

given by the bankrupt and another person, which need not be given up on proving against the estate of the bankrupt. But such is not the case. It has been admitted, that if both the joint and separate estates were administered in this country, that the case of *ex parte Moult*, *Mont.* 321, would apply; and hereon two questions arise:

1st. What is the *locus contractus*?

2d. How does the law apply?

The proof is made against the separate estate on an acceptance by *Vanzeller*: there are two contracts, one affecting the separate estate in this country, the other available against the joint estate abroad. Surely an acceptance on which a proof is made against the separate estate in this country is a transaction governed by our laws. In *Melan v. Fitzjames*, 1 *Bos. & Pull.* (fol.) 138, it was held that in a suit in England, on a contract made abroad, the remedy followed the foreign law; but that decision was never approved of, and was overruled in *De La Vega v. Vianna*, 1 *Barn. & Adol.* 284, which decided directly the other way; this latter case establishes the rule, which, whether arbitrary or not, is the rule to be acted on. I cannot perceive that it is unreasonable: it merely prevents double proofs. It has been contended that the principle laid down in *ex parte Moult*, *Mont.* 321, is not to be extended; the order made in this case is supported by *ex parte Moult*, but is not an extension of the principle of that case. That the proceedings abroad are on what is technically called an "insolvency," creates no distinction; a bankruptcy is but an insolvency under another name, and there is no case in which any distinction is recognized as applicable to the present state of circumstances. The proceedings in this country have effect abroad; many cases support this proposition. I shall content myself with citing two.

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In *ex parte* the *Royal Bank of Scotland*, 2 *Rose*, 197, it was held, that though a creditor on a bill may prove against all the parties to it, yet, if previously to his proof against *A.* a dividend has already been declared under his proof against *B.* the amount of such dividend must be deducted from his proof against *A.*

And in *Philips v. Hunter*, 2 *Hen. Bl.* 402, a commission issued against *A. B.* in England, a creditor attached a debt due to *A. B.* in a foreign country, and obtained payment thereof, and it was held the assignees of *A. B.* could recover the amount in an action for money had and received to the use of the assignees.

The argument used, that possibly full payment may be obtained abroad, only furnishes a reason why the dividend in this country should not be paid. *Ex parte Moulton*, 1 *Mont.* 321, is conclusive.

Mr. *Wigram*, in reply : —

I insist that the sequestration is a security which the appellant may retain while he proves against the separate estate for his whole debt, according to a well recognized rule in bankruptcy.

It is said that this order is merely precautionary ; it is more, it declares that he must elect. I admit that if a party pursue his remedies here, he is governed by the remedies which our laws afford. But the question of proving against both estates is a question of right and not of remedy, and if foreign law be to govern this case, as the appellants contend, that law must be administered here. There are other cases in *Barnwall* and *Adolphus* besides those cited, but they all turn on the statute of limitation as a remedy. As to *Phillips v. Hunter*, 2 *Hen. Bl.* 402, I must say I cannot perceive how it applies ; in that case, the Court said, the mere fact that the party was at the moment standing on foreign ground made no

difference: in short, *A.* had taken the property of *B.* and the Court would not permit him to retain it, because *B.* happened to be abroad. The appellant never intends to prove abroad; the insolvency there was in 1830; he has not attempted to prove abroad, he might do so now, but he stands on the sequestration, which, with his proof here, will be sufficient to pay his debt.

In conclusion, I must beg leave to reiterate, that if the law be against the appellant, yet, as he has neither done, nor threatened to do wrong, the Court cannot interfere to restrain his legal rights. The time for doing so, has not, and probably never will arise.

Cur. ad. vult.

LORD CHANCELLOR:—In this case I confirm the judgment of the Court of Review, but without costs.

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Ex parte TURNER.—In the matter of MAC-KENZIE and ABBOTT.

L. C.
Mar. 22 & 24,
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THIS was an appeal from the decision of the Court of Review in *ex parte Turner*, ante p. 54, on the following

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Turner, ante 54,
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Proof by joint estate for fraudulent abstraction, when admissible.

SPECIAL CASE.

From and previous to December 1807, to May 1811, *Mackenzie* carried on business as a merchant without any partner, on his sole account, and became indebted to various persons.

On the 25th of June 1811, he formed a partnership with *Edward Abbott*; upon the formation of such part-

Quære. Can the Court of Review entertain a petition of appeal from the rejection by the commissioner of a proof of debt on a question of fact?

An objection

that the Court of Review had no jurisdiction, cannot be taken on appeal, if not taken below.

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nership it was agreed that *Mackenzie* should out of his own funds discharge his separate debts.

By the terms of the partnership articles *Mackenzie* and *Abbott* were respectively authorized to draw sums, from time to time, from the joint funds by way of maintenance, not exceeding 700*l.* a year.

In December 1812, *Mackenzie*, without the consent or knowledge of *Abbott*, withdrew three bills of exchange, for 1,000*l.* 1,000*l.* and 700*l.* upon Messrs. *Graham's*, from the joint stock and effects, which he discounted, and applied the proceeds thereof to his own use.

It was the duty of the parties, or either of them, on disposing of any bill belonging to the firm, to enter in the bill-book of the firm the manner in which such bill had been disposed of; but no entry was made in the bill-book of the disposal of the three bills so withdrawn by *Mackenzie*.

Abbott afterwards, upon finding that the bills which were entered in the bill-book as received, were taken from the box where they had been deposited, and having ascertained by the clerk that they had been taken by *Mackenzie*, remonstrated with him upon the great impropriety of his conduct in abstracting such sums for his own use; upon which *Mackenzie* promised he would replace the amount so withdrawn as soon as assets of his private estate should arrive from the Baltic, West Indies, and other parts, which he was then daily expecting.

At the time of this discovery by *Abbott*, and of his remonstrance with *Mackenzie*, no entry of the said transaction had been made in any of the books.

That after such remonstrance and undertaking by the said *Mackenzie*, the following entry was made in the day-book of the house :

A. K. Mackenzie Dr to bills receivable.

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For <i>Graham, Simpson,</i>	}	a' 4 mo. due 18th March,	£1,000
and Co.			
For _____		a' 4 mo. — 10th _____	1,000
For _____		a' 4 mo. — 19th _____	700
			<hr/> £2,700

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And the same items were soon afterwards carried to *Mackenzie's* accounts as a debt due to the partnership, in the manner mentioned in the schedule hereunto annexed.

The sums of money mentioned on the debit side of the account in the months of February, March, and April 1813, were drawn by *Mackenzie* with the acquiescence and consent of *Abbott*, partly for his own private use, and partly for the purposes of the firm.

The items mentioned as payments to Mrs. *Mackenzie* were paid to her by *Abbott* during *Mackenzie's* absence from England upon partnership business, for the subsistence of herself and family, she being at that time in distress. (a)

All the items of the annexed account were entered therein before the bankruptcy, and about the time of their respective dates, with Mr. *Abbott's* consent and approbation.

In July 1813, a joint commission of bankrupt was issued against *Mackenzie* and *Abbott*, and *G. J. Graham*, *H. H. Mortimer*, *W. Walford*, and *W. Austin* are the assignees.

(a) The entries of these sums,	July 7, Mrs. <i>Mackenzie</i> ,	10l.
as set out in the schedule, were	— 14, _____	10l.
as follows:	— 21, _____	10l.
July 3, Mrs. <i>Mackenzie</i> ,	— 25, _____	100l.

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Upon settling the accounts between the parties after the bankruptcy, it appeared that *Mackenzie* had on the whole drawn 3,015*l.* 16*s.* 9*d.*, including the said sum of 2,700*l.*, and was entitled to credit for 1,458*l.* 6*s.* 8*d.*, the sum allowed to be drawn by the articles of partnership from its commencement until the bankruptcy, leaving a balance of 1,557*l.* 10*s.* 1*d.* overdrawn by *Mackenzie*.

On the 1st of April 1833, Mr. Commissioner *Fane* admitted a proof for 1,557*l.* 10*s.* 1*d.*, on behalf of the joint estate, against the separate estate of *Mackenzie*, on the ground that *Mackenzie* had fraudulently abstracted that amount.

On the 30th of November 1833, *Edward Turner* and *John Currick* preferred their petition to the Court of Review, praying that the proof might be expunged.

The petition was heard on the 23d day of November 1833, when the Court of Review, upon all the evidence, found that after the bills had been so withdrawn by *Mackenzie* as aforesaid, and before the bankruptcy, the appropriation of the proceeds thereof to Mr. *Mackenzie's* private use was acquiesced in and approved of by Mr. *Abbott*, and therefore ordered the proof to be expunged.

The question is, Whether the said sum of 1,557*l.* 10*s.* 1*d.*, or any part thereof, be a debt proveable by the joint estate of *Mackenzie* and *Abbott*, against the separate estate of *Mackenzie*?

Settled and approved by me,
21st January 1834. *T. Erskine.*

Mr. *Montagu* for the appellants (a) : —

It certainly may at present be considered as law, that, unless some fraud exist, the joint estate cannot prove

(a) In the absence of Mr. *Rolfe*.

against the separate estate; such law depends, not on any decided cases, and perhaps not on principle, but on various dicta on which the practice is founded. (a)

But in the case now before the Court there is not any necessity to agitate this general question, as it is a case of fraud, within all the decisions on the subject.

The rule is, that a proof may be made by the joint against the separate estate, when the property has been taken, not by contract, but by fraud. *Ex parte Harris*, 1 *Rose*, 58; *ex parte Smith*, 1 *Gl. & J.* 71; *ex parte Watkins*, *Mont. & Mac.* 57.

The only question on which any doubt can exist is, whether in fact the taking were by virtue of a contract. When there is a dormant partnership, the dormant partner, by giving total dominion over the management of the property to the acting partner, has been held to consent to such appropriation. *Ex parte Harris*, 1 *Rose*, 58; *ex parte Smith*, 2 *Gl. & J.* 74. But if there be any deception, any false entry in the books, as in *ex parte Smith* and in *Fontleroy's (b)* cases, it never has been, and never can be said that such frauds are contracts.

Upon discovery and detection of the fraud, the natural course for the party injured is to have recourse to the best means to secure himself; and the having recourse to such means is sometimes supposed to furnish evidence of previous or subsequent assent to the act; in *ex parte*

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(a) These dicta are to be found *v. Hall*, 4 *Taunt.* 328; *ex parte* in the following cases: *ex parte Batson*, *Cooke*, 562; *ex parte Ken-*
Harris, 1 *Rose*, 130, 437; *ex sington*, 14 *Ves.* 448; *ex parte*
Drake, cited in *ex parte King*, 17 *Ves.* 116; *ex parte*
Hunter, 1 *Atk.* 224, *Cooke*, 564; *Reeve*, 9 *Ves.* 588; and *ex parte*
ex parte Lodge, 1 *Ves. jun.* 168; *Sillitoe*, 1 *Gl. & J.* 382.
ex parte Cust, *Cooke*, 535; *ex (b) Ex parte Bolland*, *Mont.*
parte Grill, *Cooke*, 534; *ex parte & Mac.* 315.
Muggeridge, *Cooke*, 125; *Heath*

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Bonbonus, 8 Ves. 545. Lord *Eldon*, in an inquiry whether the appropriation by one partner of a partnership bill to the payment of a separate debt was by consent of the partner, says, "There is no doubt now. The law has taken this course, that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it were for an antecedent debt, *prima facie*, it will not bind them; but it will, if you can show previous authority, or subsequent approbation."

In *ex parte Harris*, 1 Rose, 440, Lord *Eldon* says, "If *Ramsay* knowingly acquiesced in what necessarily gave to *Aldrich* the whole controul over his property, he must abide by the consequence of his own conduct. Although, therefore, the money may have been taken without the knowledge, privity, consent, or subsequent approbation of *Ramsay*, yet the facts by which *Aldrich* was so enabled to possess himself of it, were facts within his knowledge, privity, consent, and approbation; and therefore the consequence of those facts must also be taken to have been within his knowledge, and with his privity, consent, and approbation."

The question then is, Was the taking in this case by virtue of a contract? The only possible evidence in favour of this suggestion must be the facts which have occurred since the discovery of the abstraction was made.

Subsequent knowledge, that is, mere discovery of the fact, cannot of course be construed into assent; *a fortiori* therefore, subsequent discovery and dissent cannot be so construed. (a)

In the case of *De Tastet*, Mont. 138, 153, a person

(a) *Ex parte Agace*, 2 Cox, 512.

called on *De Tastet* and said, "I hold a bill of yours for 24,000*l.*" *De Tastet* answered, "If you do, it is a forgery, and the person on the other side of the fireplace is the forger." And the person thus pointed at shuffled out of the room. "Give me back my wines and rums," said *De Tastet*. Was that an acquiescence? In *Fontleroy's* case (a), the instant the other partners became sensible of the mischief done, would they not endeavour to recover all they could, and would their so doing be considered acquiescence in what had been done?

It is incumbent on a party injured to do the best in his power to repair the injury, and his vigilance cannot operate to his prejudice.

In *ex parte Watkins, Mont. & Mac.* 57, the case was as follows: *William Sykes, Henry Sykes, and Thomas Wilkinson* were in partnership as bankers. According to the practice of the firm, that sales might be readily made, it was customary to transfer into the name of one of the partners all stock purchased by the house as an investment of capital. In October 1823 there was standing in the separate name of *Henry Sykes*, in the books of the bank of England, 20,000*l.* On the 6th of October *Henry Sykes* sold and transferred the above sum, and received the produce, amounting to 16,549*l.* 17*s.* 11*d.* Of this he paid 8,318*l.* 2*s.* 11*d.* into the banking-house on account of the partnership, and appropriated the remainder to his own use. In December 1825 a commission issued against the firm, and a petition was presented for the admission of a proof for the benefit of the joint estate. On his examination before the commissioners, *Henry Sykes* admitted that this application of the proceeds of the partnership funds was not under the autho-

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rity or with the consent or knowledge of his partners, that he did not mention it to his partners because *Wilkinson* was absent from illness, and *William Sykes* did not attend to that department; but that he stated to *Sykes*, immediately on his return a day or two afterwards, that he was in want of money, and had therefore taken 10,000*l.* consols, partnership stock, to his own use, and that he had no reason to believe that the transaction ever met with the approbation either of *Wilkinson* or of *William Sykes*. *Wilkinson* being examined before the commissioners, stated, that on his return to town, after an absence of a day or two, *Henry Sykes* told him that he had sustained considerable loss, and that he had applied 10,000*l.*, belonging to the house, to his own use; that he replied he was sorry to hear it, and that he must replace it as soon as he could; that on one occasion, previous to charging *Henry Sykes* with the dividends, he asked him if he had replaced it, and hearing that he had not, expressed a hope that he would be able to do so speedily; that he charged *Henry Sykes* with the dividend, because he considered it necessary to get what he could,—the interest if he could not get the principal; that he never sanctioned, confirmed, or approved the transaction, unless so far as receiving interest in the manner stated may be so considered; that he never charged or received interest from any other motive, or for any other reason, than from being desirous to get what he could back; that he did and does consider the transaction as one in breach of faith to the partnership. In answer to the petition, an affidavit of *Henry Sykes* was filed, stating that it had been very usual for the private accounts of the partners to be overdrawn; that the partner so overdrawing did not require the previous consent of his other partners for so doing, and that such overdrawings were considered as debts due to, and not as

frauds on, the partnership; that from the 6th of October 1823 to the time of the house stopping payment, the appropriation so made by him for his private accommodation was treated by him and his partners in all respects as a debt of 10,000*l.* consols, due to the partnership from him; that he was regularly debited with the dividends; that his partners did not on any occasion, in his hearing, allude to such appropriation as fraudulent or a breach of faith to the partnership, or in any other way than a debt of stock; that no alterations were made in the dealings of the partners towards each other, by reason of such appropriation having been made; that he and his partners continued respectively to overdraw their accounts; and that he subsequently continued to have stock placed in his name, on account of the partnership, with the consent of his partners. The Vice-Chancellor said, "It appears to me, that there is nothing like acquiescence amounting to subsequent approbation, and that under the circumstances, the partners could not have acted otherwise than they did; they kept an account of the dividends that would have accrued due on the stock sold, and charged them to the debit of *Henry Sykes*. It is admitted that he did, in effect, sell out 10,000*l.* consols, of which part was brought into the house, and part applied out of it, to answer stock transactions; but inasmuch as he was charged with dividends on 10,000*l.* stock, it appears to me that the transaction was treated as a sale and appropriation to his separate use of that sum, and that the proof ought to be for the whole amount." And the proof was ordered accordingly.

Such is the law applicable to the present case; the facts are extremely simple.

Previous to June 1811 *Mackenzie* was a trader, and

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had contracted some debts. On the 25th of June 1811 the partnership was formed on the express stipulations, 1st, that *Mackenzie* was not to apply any of the joint funds to his own private use, and, 2d, that each partner was to receive 700*l.* per annum. In December 1812 the property in question was fraudulently taken by *Mackenzie*, and applied by him to his own private use, and no entry thereof was made in the books. On discovering the fraud, *Turner* remonstrated with *Mackenzie* on the impropriety of his conduct, and *Mackenzie* promised to pay the money, and the transaction was then entered in the books.

Is this mere subsequent knowledge? Is it not more? Is it not knowledge and dissent? Doing, at the same time, all that could be done to secure payment.

The advances to the wife, and the advances for the partnership purposes, cannot be construed into evidence of previous assent or subsequent waiver.

The Court of Review decided, that the proof which the commissioner had admitted must be expunged; that there was no evidence that the original taking was fraudulent, and if it had, yet the subsequent conduct of the partner was a waiver of the fraud. It is submitted such decision was erroneous.

March 24. *Mr. Rolfe*: — It appears that the respondents intend to rest their defence on the statement of the special case, “that after the bills had been so withdrawn by *Mackenzie* as aforesaid, and before the bankruptcy, the appropriation of the proceeds thereof to Mr. *Mackenzie*’s private use was acquiesced in and approved of by Mr. *Abbott*,” and mean to contend, that as the judgment of the Court of Review turned on that circumstance, which was a question of fact, no appeal lies, which can

only be on a matter of law or equity, and not on a matter of fact. (a)

LORD CHANCELLOR: — Is that the defence?

The *Solicitor General*: — It is.

LORD CHANCELLOR: — Does not that put an end to the case?

Mr. *Rolfe*: — But the appellants contend that it is not a matter of fact, but a question in which the fact and law are inseparably involved together. On a question, Who is the heir? the fact and the law are completely blended; the same occurs when a question arises as to the validity of a foreign marriage. By this mode of proceeding the right of appeal becomes almost a dead letter.

LORD CHANCELLOR: —

No doubt questions of law and fact are often so wrapped up together as to render it nearly impracticable to separate them; as, whether a man be or be not the agent of another; whether a deed have been executed by an attorney, &c. In this case care should have been taken that the law and fact were winnowed clear of each other when the special case was drawn; or, if that were not possible, then a petition, and not a special case, should have been had recourse to, as was done in *ex parte Keys*. (b)

I will take this opportunity of stating, that the act (c)

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(a) Subject to an appeal to the Lord Chancellor, on matters of law and equity, or on the refusal or admission of evidence only. 1 & 2 W. 4, c. 56, s. 3.

(b) *Ante*, page 226.

(c) "In cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatsoever, except the Lord Chancellor shall in any case otherwise direct; which special case shall be approved and cer-

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Review to sign
a special case.

is imperative on the Judges of the Court of Review to sign a special case, otherwise they might exclude the appellate jurisdiction. The Judge who signs or certifies a special case, does not thereby render himself responsible for the accuracy of the statements therein contained, nor for the propriety of the appeal; he merely signs the case, and discharges a judicial duty imposed by act of parliament.

Mr. Rolfe: —

Quære. Can the Court of Review entertain a petition of appeal from the rejection by the commissioner of a proof of debt on a question of fact?

The respondents contend, that the question turns on matter of fact only; if so, the Court of Review had no jurisdiction to entertain the case; this is clear from the words of the 1 & 2 W. 4. c. 56. ss. 30 and 31.

Section 30 enacts, " That any one of the said six commissioners, if he think fit, may adjourn the examination of any bankrupt or other person to be taken either before a Subdivision Court or the Court of Review, and may likewise adjourn the examination of a proof of debt to be heard before a Subdivision Court, which said Court shall proceed with such last-mentioned examination, and finally and without any appeal, except upon matter of law or equity, or of the refusal or of the admission of evidence, shall determine upon such proof of debts: provided always, that in case, before the said commissioner or subdivision court, both parties, the assignees or the major part of them and the creditor, consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the said commissioner or subdivision court, and sent for

tified by one of the judges of the issues; and the determination of the said Court of Review in matters such judge on the settlement of arising in the said court, and by of such case shall be final and the judge trying the issue in mat- conclusive." 1 & 2 W. 4, c. 56, ters arising out of the trial of s. 3.

trial before the chief judge or one or more of the other judges; and if one party only applies for such issue, the said commissioner or subdivision court shall decide whether or not such trial be had, subject to an appeal as to such decision to the Court of Review."

And section 31 enacts, "That if such commissioner or subdivision court shall determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought under review of the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal shall be disposed of; and a sum, not exceeding any expected dividend or dividends on the debt in dispute in such proof, may be set apart in the hands of the accountant general, until such decision be made; and in like manner there may be an appeal on the like matter of law and equity from the Court of Review to the Lord Chancellor."

Consequently it is not open for the other side to contend, that this a matter of fact, as, if so, the Court of Review would not have had jurisdiction to entertain the petition.

LORD CHANCELLOR :—The objection of want of jurisdiction is preliminary. Was it taken in the Court of Review?

Mr. Rolfe :—The appellants did not take the objection, conceiving this to be a matter of law. The respondents now, for the first time, object it is a question of fact; to which we answer, if so, the Court of Review could not have entertained the question at all, and their decision must be on that ground reversed.

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LORD CHANCELLOR:—The objection of want of jurisdiction, not having been taken below, cannot now be urged. This appeal must be dismissed, with costs. I had taken down the learned and able argument of Mr. *Montagu* on the point of law, but I find this case another illustration of the common law maxim, that an ounce of fact is worth a pound of law.

Appeal dismissed. Assignees' costs out of estate.

L. C.
March 25
& 27,
1834.

Upon a new
choice of as-
signees there is
no necessity to
vacate the as-
signment under
a commission
issued prior to
1 & 2 W. 4.
c. 56.

SMITH v. DE TASTET.

A BILL was filed by *Smith*, as assignee of *Eliséé*, to set aside an assignment of a legacy given to the bankrupt, which assignment had been made to the defendant after he had notice of an act of bankruptcy.

The bill stated that a commission issued against *Eliséé* (previous to the establishment of the court of bankruptcy), under which *Le Taverner*, since deceased, and *Rubichon*, who then resided in Italy, were chosen assignees, to whom the usual assignment of the personal estate of the bankrupt was made by the commissioners; that by an order of the Court of Review, *Rubichon*, the surviving assignee, had been discharged, and the plaintiff had been duly chosen and appointed in his stead, and was the sole assignee.

To this bill the defendant demurred, on the ground that, as no assignment had been made by *Rubichon* to the new assignee, nor the original assignment vacated under the provisions of the statute (a), the estate was still

vested in *Rubichon*, and that he was, therefore, a necessary party.

His Honor the Vice-Chancellor allowed the demurrer; and this was an appeal from his Honor's decision.

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The *Solicitor General*, Mr. *Treslove*, and Mr. *Evans* for the plaintiff: —

The question for the determination of the Court on this appeal depends on the construction of section 25 of the 1 & 2 W. 4, c. 56, which enacts, "That when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become absolutely vested and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents as if such estate or effects were assigned by deed to such assignees and the survivors of them; and as often as any such assignees shall die or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, shall by virtue of such appointment vest in the new assignee, as the case may require, without any deed of assignment for that purpose."

It was contended by the defendant, that by this section the necessity of divesting the old assignee of the legal title, either by assignment to the new assignee or by vacating the original assignment, was not removed as regards old commissions, and of this opinion was the Vice-Chancellor. But the words of the section are general, and not confined to fiats issued under the new act.

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 ———
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This was property which might have been assigned by commissioners under the old law, and therefore vested absolutely in *Smith* upon the new choice, by operation of the 25th section of 1 & 2 W. 4, c. 56, without any other act than the mere appointment.

Acting on this construction, the Court of Review has, in various cases, on an application for a new choice, refused to order previous assignments to be vacated, considering that unnecessary, as the estate vested in the assignees for the time being by virtue of their appointment; *ex parte Forster*, *Mont. & Bli.* 88.

That this is the true construction will, if the words of section 25 be doubtful, appear from the general tenor of the statute, the intent of the legislature being to extend the beneficial operation of the act to all cases; and by section 39 it is enacted that all the commissions then depending in London shall be removed into the Court of Bankruptcy, "and that all further proceedings thereon shall be thenceforth prosecuted and carried on in like manner as if they had been originally commenced therein by virtue of a fiat issued in pursuance of this act." The change of assignees is a "further proceeding" within this clause. The beneficial effect of the statute in this case is, the saving the great expence attendant on an assignment from *Rubichon*, or of applying to the Court to vacate the assignment.

This case is, therefore, within both the spirit and the words of the statute.

Mr. Rolfe and *Mr. Koe* for the defendant:—

Previous to the 1 & 2 W. 4, c. 56, it was necessary, for the purpose of divesting the old assignees of their title, that they should assign, or that the assignment should be vacated under the provisions of 6 G. 4, c. 16, s. 66, *Bloxam v. Hubbard*, 5 *East*, 407. If the legis-

lature had intended to divest old assignees of their legal title without such assignment, express words would have been used to that effect. The first part of section 25 enacts, that when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which might be assigned by commissioners, shall become absolutely vested, &c. These words cannot apply to the present case, for at the time this statute came into operation, there was not any property of the bankrupt which might have been assigned by the commissioners; the whole had been previously assigned by them, and was duly vested in *Rubichon*. The commissioners could not make any further assignment, until that prior assignment had been vacated. This first part of the section, therefore, only applies prospectively to assignees appointed under that act; and the plaintiff is not aided by the second branch of the clause, for the words are, "as often as any such assignee shall die, or be lawfully removed," &c., which must mean assignees to be appointed in pursuance of the first branch of the clause, and can only operate in case of the death or removal of any "such" assignee.

We submit that the property is vested in *Rubichon*; and if not absolutely, yet that he has such an interest as to be a necessary party to this suit.

As to the decision of the Court of Review in *ex parte Forster*, *Mont. & Bli.* 88, the point does not appear to have been fully considered, as it was an *ex parte* application.

The *Solicitor General* in reply: —

The property might have been assigned by the commissioners; the vacating the previous assignment was a mere formal act and mode of conveyance, which could not affect the right.

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But even if, to perfect the plaintiff's legal title, the original assignment should have been vacated, yet all *Rubichon's* interest being divested, he was neither a necessary or proper party, as will appear from an analogous case of *Lloyd v. Lander*, 5 *Mad.* 288, which was a bill by a mortgagee of copyhold against the assignees of the mortgagor, who had become bankrupt, and the bankrupt was made a party, as no bargain and sale had been made to the assignees of the equity of redemption; but a demurrer by the bankrupt as an unnecessary party was allowed, Sir *John Leach* saying, "the equity of redemption is not an estate, but an interest, and may well be considered as substantially vested in the assignees before bargain and sale."

The LORD CHANCELLOR:—

March 27.

This was an appeal from a decision of the Vice-Chancellor allowing a demurrer for want of parties. The alleged defect in the suit is, that *Rubichon*, the original assignee under the commission of bankrupt against *Eliseé*, was not made a party. Now *Rubichon* was regularly dismissed under the authority of the late act, 1 & 2 W. 4, c. 56, by an order of the Court of Review, and the plaintiff *Smith* was duly chosen and appointed a new assignee. But as the bankruptcy existed long before that act passed, it is contended that the 25th section does not apply to this case.

If the interest be divested from *Rubichon*, it is clear there was no occasion for making him a party, and I have no doubt that it was; and that the whole interest was vested in *Smith* by operation of law, so as to render any assignment from *Rubichon* to *Smith* unnecessary. It was therefore unnecessary that *Rubichon* should be a party to this suit.

In support of the order it is said, first, that the

25th section of 1 & 2 W. 4, c. 56, only vests in the assignees, by the earlier branch of that section, all the estate and effects which the commissioners by the laws now, that is at the date of the act, in force might assign, and that by those laws then in force, an order of the Court was required to transfer the property, which it is confessed was not obtained in the present case.

But that is not the sound construction; the plain meaning of the words in the first branch of the clause, "all the estate which may be assigned by the commissioners," being all that falls under their power as commissioners, in whatever way the assignment is to be made by them. It may even mean, that if there be any thing to be done for the purpose of transferring, by means of an order of the Court: but there is no occasion for resorting to this supposition. The words are general, and vest in the assignees, without any assignment, whatever an assignment could, as the law before stood, have carried. The object of the provision is to supersede the necessity of any assignment.

Secondly, It is said that the second branch of the clause, by the use of the word "such," as a word of reference, applies to assignees in future to be appointed, and not to those already appointed, as *Rubichon* was. But I am of opinion that the words "such assignees" mean only to avoid the repetition of the expression immediately before employed, namely, "assignee or assignees for the time being."

It appears to be manifest that this second branch of the section transfers all interest from the assignee dying or removed to the new assignee, and that its object is to avoid the necessity of any act being done beyond the appointment of a new assignee. The transfer is made to depend on, and flow immediately from that appointment, "as often as any such assignees shall die or be

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lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall, by virtue of such appointment, vest in the new assignee, without any deed of assignment for that purpose."

This construction has apparently been adopted by the Court of Review, and their practice is to refuse the order which the decision of the Vice-Chancellor in this case would render necessary. *Ex parte Forster*, 1 Mont. & Bli. 87, was a petition presented to their Honors, praying an order vacating the assignment to an assignee who had absconded; and it was contended, as here, that the act contemplated future fiats. But their Honors refused to vacate the assignment, holding it unnecessary, and that the new choice was sufficient.

There is undoubtedly great weight due to this construction given to the section, and acted upon by the Court of Review. That it is also a construction recommended by considerations of manifest convenience needs hardly be added.

In disposing of this case upon the construction of the act merely, I give no opinion on the other question, whether, supposing *Rubichon's* interest as assignee had not been divested by operation of law, it would have been a ground of demurrer that he had not been made a party. The necessity for considering that point would only have arisen in case I had concurred in opinion with his Honor on the other point.

Demurrer over-ruled.

Ex parte RICHARDSON.—In the matter of
CONSITT and LEIGH.

C. of R.
April 14,
1834.

IN this case a petition had been presented, and an order made thereon, for the reference of certain bills of costs to the deputy registrar, for taxation. The deputy registrar had made his certificate of taxation.

A motion may be made that the registrar may review his certificate of taxation of costs.

Mr. *Swanston*, with whom was Mr. *Montagu*:—
This is a motion that Mr. *Gregg* may be directed to review his taxation.

A petition may be necessary to oppose or amend it.—
Per C. J.

Mr. *J. Russell*, *contrd*, objected that this application could not be entertained on motion, a petition being necessary.

Non-payment of the taxed costs into Court not a preliminary objection to the motion.

This is a report, or equivalent to a report, to deal with which on motion is at variance with all rules of practice. When an objection is intended to be made to a taxation of costs, the course is either,

1. To present a petition of exceptions, *Pitt v. Mackrith*, 3 *Brown*, 321, or
2. To petition for leave to file exceptions, *Fenton v. Crickett*, 3 *Madd*. 496.

To entertain such applications on motion would lead to two inconveniences.

1. The items objected to are not accurately specified.
2. The motion may be (and in this case is) made on affidavits containing evidence not before the officer.

In *Jenkinson v. Royston*, 9 *Price*, 215, a motion was made for leave to file exceptions. The notice of motion

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was in general terms, merely stating that such a motion would be made, and that the parties intended to read affidavits filed on former motions. The Lord Chief Baron said: "In this case I think it is unnecessary to inquire what has been the practice, which seems to be doubtful; we may proceed on principle, and the reason of the thing. The Master has made his report. A motion is then made for leave to except. We must suppose the Master to be right, and the Court ought not to give leave to except, without being informed what are the exceptions intended to be taken, and on what they are founded. They may be frivolous and idle, and without any sort of foundation; and it is a proceeding calculated to create injurious delay. These exceptions only state, that the Master, having reported as he has done, ought to have reported otherwise. But that gives us no information; it is not stated why he should have reported otherwise, or wherein he has done wrong, or why, if he had reported otherwise, he would have done right. The whole proceeds on mere assertion. Before I make an order that the Master review and alter his taxation, as I am in effect required to do, surely I ought to have some reasonable ground for making such an order. Not being apprized of there existing any good cause for making such an order, I certainly shall do no such thing.

In *Lucas v. Temple*, 9 Ves. 299, Lord Eldon expressly decided that exceptions did not lie for costs, but that a petition must be presented; and in *Pitt v. Mackreth*, 3 Bro. C. C. 321, Lord Thurlow said that exceptions were never admitted, but "that the regular method was to state the articles the party meant to object to on petition, and grant leave to except."

Such is the practice in equity; and the practice of

this court is to follow that of equity till altered by a general order of this Court. (a)

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Mr. *Ching*, for another party against whom a similar motion was made: — If a petition were presented, it would state the objections to the taxation, and we should at once perceive if the taxation were erroneous, and if so, should not come here to oppose the review thereof; but, a notice of motion being in general terms, we are compelled to come here to ascertain what is asked against us. If the motion be granted, the Registrar, having nothing to guide, no beacon, will not know how to act.

Mr. *Swanston* and Mr. *Montagu*: —

The affidavits filed in support of the motion contain all the facts that would have been embodied in a petition, and more. *Ex parte Crockwell* (b) decides that it is not necessary to present a petition for leave to except

(a) That the practice in the Court of Review shall, until otherwise ordered, be conformed as nearly as may be to the present practice in matters before the Lord Chancellor.—Court of Review, Jan. 12, 1832. Order 25th.

(b) Court of Review, July 26, 1832.

Ex parte CROCKWELL.—In the matter of CROCKWELL.

This was a petition for the confirmation of Mr. *Gregg*'s certificate of taxation of a bill of costs, which was opposed, and exceptions now tendered in Court.

Mr. *Montagu*, for the petition, objected to the respondents being

heard in opposition to the certificate, they not having procured leave to present a petition excepting to the certificate, which constant practice required to be done.

Per Curiam: — On a reference to a Master in Chancery to tax costs, no exceptions can be taken to his report, without previously presenting a petition for leave to except: that originated in an idea of showing respect to the Master. But no such rule prevails in this Court when exceptions are taken to the taxation of a Registrar or Deputy Registrar.

Not necessary to obtain leave to except to the registrar's certificate of taxation.

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to a report or certificate of taxation. The third section of the 1 & 2 W. 4, c. 56, enacts that all matters to be determined in the Court of Review shall be brought on by way of petition, motion, or special case, according to the rules and regulations to be established as therein-after provided.

Though the practice in Chancery was to proceed on petition, yet in courts of common law it was always done on motion, and this, being a court of law and equity, may pursue either course, and will adopt that which is attended with least expence to the parties.

We might abandon the affidavits, and proceed on the *allocatur* of the Registrar alone.

Mr. *Russell*, in reply: — The order asked has never yet been made in bankruptcy on motion. Affidavits should be used to support a case, not as a means of stating the case itself.

The CHIEF JUDGE: —

There can be no doubt as to the power of the Court to entertain such applications on motion, the only question which could arise would be as to the expediency of so doing.

If the objection appear on the face of the certificate, or report, there never was any necessity for a petition for leave to except; this was held by the Vice-Chancellor in *ex parte Farquharson*. (a)

The principle of the objection does not apply to a

(a) *Ex parte Farquharson*, in the matter of *Starkie*, 17 June 1831. MS.

VICE CHANCELLOR: — "It is not necessary to except in the regular way; if it appear on the face of the report that the Master is wrong, the Court can decide."

case like the present, where there is a regular report, or rather certificate. When a party opposes the report, or seeks to amend it, it may be necessary to present a petition. But here the order asked is, that the officer may review his certificate as to bills of costs referred to him for taxation, and the question is, whether he have properly understood and pursued the order of the Court? a question which will be decided at once by looking at the order and the certificate, and if thereupon it appears that the officer has not comprehended or followed the order, then we should not set it aside, but refer it back to him.

If there had been any inflexible rule to prevent this being done on motion in Chancery, perhaps this Court could not now act on motion, but there not being any prohibitory rule, there is nothing to disable us from entertaining this on motion.

If the notice of motion be so worded that the party called into Court cannot ascertain the point he is required to answer, that would be a ground for the matter standing over till the notice of motion were amended and rendered more specific.

Sir John Cross: —

As yet the Court is ignorant of the facts of the case, and the party opposes the hearing which would enable the Court to ascertain those facts, on the technical objection that there is a universal rule which prevents the matter being entertained on motion.

Many cases have been cited, which only prove that it was the general practice to present petitions in certain classes of cases, but not one was cited in support of the proposition that this particular matter cannot be heard on motion.

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That we can entertain this application on motion unless prevented by general practice, is clear. When this Court was instituted, the Judges resolved not to make any new code of practice, but to adhere to the old, but in so doing it never was intended to rule that no case, however short, or small in value, should be heard otherwise than on petition.

It is an established practice in common law courts to entertain similar matters to the present on motion.

I agree with his Honor the Chief Judge that this matter should be heard on motion:—1st, Because we are not prevented by any inflexible rule. 2d, Because doing so is a saving of expence, and prevention of delay.

Sir George Rose:—

Whether the Court have power to hear any matter on motion, and whether it will do so in the exercise of its discretion, are distinct questions.

In the present case, if a petition were necessary, then there is one already in this matter before the Court, that on which the original order of reference to the Registrar was made.

Before the Lord Chancellor, sitting in bankruptcy, it was the constant practice to make orders on motion, though in strictness they could only be made on petition, because, owing to the peculiar nature of the jurisdiction, an order was not valid, if contested, unless made on petition.

The 1 & 2 W. 4, c. 56, s. 3, expressly enables this Court to hear matters on motion, if it think fit.

No one will deny that a motion may be made in bankruptcy to stay an attachment for nonpayment of costs, yet, on that motion, it might become necessary to review

the taxation of the costs, the nonpayment of which is the foundation of the attachment.

I wish it to be understood that this Court clearly has jurisdiction on motion in a case like the present.

Even if a petition had been presented, it would not have contained any statement of the facts, the allegations would have been quite general, and the facts would have come out, if at all, on affidavit.

Though the Court has jurisdiction to entertain these questions on motion, yet the present decision must not be understood as interfering with our discretion to order a petition in cases where the facts require it.

Mr. Russell then objected that the amount of the taxed costs had not been paid into Court, and cited *ex parte Leigh*, 4 *Madd.* 394, where a petition was presented for leave to except to the Master's report of costs, and the Vice-Chancellor stated, that such an application being in the nature of an appeal, the petitioner must pay the taxed costs into Court.

The CHIEF JUDGE:—The case of *ex parte Leigh* does not lay down a general rule, it only decides what course was to be pursued in that particular case, and the registrar informs me that it is not the usual practice to require the payment into Court.

Sir *George Rose*:—This is not a preliminary objection to the opening of the case. It may be proper to make the payment into Court one of the terms of the order, if made, but I am of opinion that this is not a preliminary objection.

And of this opinion were the rest of the Court.

Objections over-ruled.

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C. of R. *Ex parte* LADBROKE.—In the matter of BARKER.
April 16,
 1834. **MR. WRIGHT:**—This is the common petition by

The Court will not order a sale by private contract, the commissioners having power so to do.

an equitable mortgagee for a sale of the mortgaged premises; it also prays that the premises may be sold by private contract.

Per Curiam :—The Court will not order the premises to be sold by private contract. But the commissioners may order such to be done, if they find it expedient; there is no rule preventing them. (a)

C. of R. *Ex parte* DALY.—In the matter of DALY.
April 16,
 1834. **THIS** was a petition to supersede for want of the

When a petition stands over to have a *vivd voce* examination, that side begins with whom the affirmative lies.

requisites, which stood over to this day in order to the examination of witnesses *vivd voce* in support of the fiat. When called on this day, Mr. *Swanston*, with whom was Mr. *K. Parker*, when proceeding to open on behalf of the petitioner, the bankrupt, was stopped by

The COURT, who said that in such cases, where the Court orders a *vivd voce* examination, the right of opening was similar to what would exist on an issue directed, that side opening with whom the affirmative lay; and that consequently in this case, the respondent, who was the petitioning creditor, should begin.

* Mr. *Whitmarsh* and Mr. *Alexander* for the petitioning creditor.

Mr. *Bacon* for the assignees.

(a) See *ex parte Coming*, 1 Ves. jun. 112. The words of Lord *Rosslyn's* order are, "the mortgaged premises are to be sold before them, or by public auction at any other place or places, if they shall so think fit."

Ex parte PATRICK. — In the matter of
HOLTHOUSE.

C. of R.
April 18,
1834.

THIS was a petition by the assignees to expunge a proof on the ground of the debt being tainted with usury, or for an issue.

Holthouse having occasion for a sum of money, applied to Messrs. *Ladbroke* and Co., his bankers, to advance him 4,000*l.*, which they agreed to do at 5*l.* per cent. interest; at the same time it was stipulated that the bankrupt should keep in the hands of Messrs. *Ladbroke* and Co. an average balance of 1,000*l.* But *Holthouse* drew out part of the 1,000*l.* He every year sent a check for the amount of interest on the loan of 4,000*l.*, and also sent a check for a sum with these words: "Mr. *Holthouse's* compliments to Messrs. *Ladbroke* and Co., and has inclosed a check for the difference of interest on balance."

A banker lent a customer 4,000*l.* at five per cent.; and it was agreed that a balance of 1,000*l.* at least should always be left: held, under the circumstances of the case, not usurious.

The bankrupt's account with Messrs. *Ladbroke* and Co. amounted to very large sums. In 1825 it was 60,606*l.*, and gradually increased till 1832, in which year it was 108,874.

The grounds on which the proof was admitted were set forth by the commissioner in the following written opinion:

"Mr. Commissioner *Fane's* Judgment.

"This was an application by Messrs. *Ladbroke* and Co. to prove under the estate of *Holthouse* 3,447*l.* 6*s.* 4*d.* for money lent and interest; the loan was admitted, but it was alleged that the money had been lent in pursuance of an usurious contract, and the whole question was, whether the contract were usurious?

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Ex parte
 PATRICK.
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“The facts are not disputed; the difference of opinion is as to the legal conclusion from the facts, viz. as to the character of the contract.

“The facts appear to be these: Messrs. *Ladbroke* and Co. had acted as the bankers of Messrs. *Holthouse* and *Detmar*, sugar refiners, for some years, and had thus come to know that the account of Messrs. *Holthouse* and *Detmar* was rather a troublesome one—one which it would be hardly worth their while to keep, unless a pretty good balance were usually left in their hands.

“In 1824 or 1825 Mr. *Detmar* died, and at that time Messrs. *Ladbroke* and Co. were in advance to the firm to the amount of some thousands. Mr. *Holthouse*, the surviving partner, wound up the affairs of the late partnership, and in so doing paid off the above debt. In January 1825 he waited on Mr. *Ladbroke* and Mr. *Gillman*, two of the partners, and had a conversation with them relative to his future dealings with them. In his examination upon oath he says, ‘I called at the bankers, and saw Mr. *Ladbroke* and Mr. *Gillman*; I explained that I required a loan of 4,000*l.* in carrying on my business; and I stated that I could deposit a policy of assurance for 4,000*l.* upon my life with them as a security. Mr. *Gillman* said in reply, that they were ready to grant me the loan of 4,000*l.* I then inquired of Mr. *Gillman* what balance he expected I should keep? and he replied that I could not keep less than 1,000*l.*; and I said, very well.’

“‘Q. Why did you inquire of Mr. *Gillman* what balance you should keep?

“‘A. Because they had agreed to afford me the accommodation of a loan of 4,000*l.*

“‘Q. Did Mr. *Gillman* so understand the object of your inquiry?

“ ‘A. I cannot say, except that he replied that I ought to keep a balance of 1,000*l*.

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“ ‘Q. Supposing that you had not borrowed that sum, should you have made any such inquiry and arrangement?

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“ ‘A. Certainly not.’

“ Mr. *Gillman* was also examined on oath, and in answer to a question, ‘Did you make any agreement with Mr. *Holthouse* at the time of the loan for the payment of any sum at the end of the year?’ he said, ‘I think I remember I had some conversation with Mr. *Holthouse* to the effect that it would not be worth our while, unless he kept with us an average balance of 1,000*l*., and he said we might leave it to him.’

“ Mr. *Holthouse* nowhere ventures to swear that the bankers either directly told him, or indirectly gave him to understand, that they would not lend him the 4,000*l*. unless he would agree to leave an average balance of 1,000*l* in their hands; on the contrary, he says that it was not until after they had agreed to lend the 4,000*l*. on the security offered, that any thing was ever said on the subject of what would be a proper balance. His language is, ‘Mr. *Gillman* said they were ready to grant me the loan, and I *then* inquired,’ &c.; and to the question ‘Why did you inquire, &c.’ his answer was, ‘Because they *had* (in the past tense, *had*,) agreed to afford me the accommodation,’ &c. The policy was deposited, 4,000*l*. was placed to the credit of Mr. *Holthouse*’s account, and the relation of banker and customer was established, or rather continued, with an understanding in Mr. *Holthouse*’s mind, an understanding which Messrs. *Ladbroke* very reasonably declare they intended should exist, that he should keep with them an average balance of 1,000*l*.

“ Messrs. *Ladbroke* admit, or rather avow, that in the

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conversation about the balance, Mr. *Holthouse* used some expression to the effect that he would somehow or other satisfy their expectation as to his keeping an average balance of 1,000*l*. From that period until the bankruptcy, Mr. *Holthouse*, by a plan of his own which he did not explain or even communicate to the bankers, ascertained annually what he thought would be a compensation to them for the diminution of profit arising from his not adhering to the understanding about the average balance, and sent them a check for the amount, with which they regularly debited his account. His plan he explains in these words: ‘I made out a weekly account of the balance in my banker’s hands every Tuesday after I had paid in my week’s collection, and, by dividing the aggregate by 52 I got at the presumed average balance for the year, and on the difference between that average balance and 1,000*l*. I calculated interest at five per cent., and sent the check for that amount.’

“These are the admitted facts of the case, and it is insisted for the assignees, that from these facts I ought to conclude, that the loan of 4,000*l*. was a loan for usurious interest. But would that be a correct conclusion? Suppose that the loan had been completed first, without any thing having been said about the balance to be kept, and that a month afterwards the conversation and mutual understanding respecting the average balance had occurred, no one in his senses would in such a case contend that there was any thing illegal in the two contracts, or either of them; if, indeed, the expectation on one side, and intention not to disappoint it on the other, as to the average balance, could be properly called a contract? Suppose again that there had been no loan, but merely the conversation and its result, no man would contend that there was any thing, I will not say illegal,

but even incorrect in it. Are not bankers, like other persons, at liberty to set their own value on their own services, provided they do so before their services are rendered? Are not bankers at liberty to say to a person proposing to them to keep his accounts, 'Our establishment is expensive; we have to pay rent and taxes, to pay clerks, to purchase books, &c. Our only means of meeting these expences, and of procuring the usual profits on our business, is the interest we can make on the deposits of our customers; and although perhaps we might be satisfied with a less balance from a less troublesome customer, yet we have good reason to believe that your account will be a troublesome one, and therefore from you we shall require a large average balance.' No reasonable person can deny that bankers may say so, and not only legally, but most correctly.

"It is plain, then, that if these two contracts — (if indeed the second can with propriety be called a contract — are considered separately and unconnected with each other, they are both perfectly legal and perfectly correct; but it is contended that they cannot be regarded separately, that they ought to be looked at as one and the same contract, and that a contract for a loan at usurious interest; and why? for this reason, and this only, that the contract for a loan and the mutual understanding occurred at the same meeting; not that they were parts of the same transaction, but that the second followed so closely upon the first that they must be deemed as one.

"Undoubtedly there are many cases where an attempt has been made to disguise the truth of a contract for a loan at usurious interest, by connecting it with some other transaction, such as a sale of pictures or of goods; and whenever there has been reason to suspect that the real contract was a usurious loan, and the rest mere colour,

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the Court has said, ' We will not shut our eyes to a truth concealed by so flimsy a veil ;' and have adopted the conclusion, that the real transaction was a usurious loan ; but in all such cases the real point for consideration has been, whether the collateral transaction were not merely colourable, and that is the real point here. Then is there any pretence for saying that the incidental arrangement was merely colourable ? The bankers say, ' We required an average balance, because without some balance we could make no profit.' Is that unreasonable ? Certainly not. ' And we require a balance of 1,000*l.*, because we are obliged to keep unemployed, say 300*l.* ; and if we employ 700*l.* without running risks, we cannot make at the utmost more than four per cent., and we do not think we ought to make less than 28*l.* per annum by a customer who gives us so much trouble as you are likely to do.' Is that unreasonable ? Surely not. Do the assignees mean to contend that this profit of 28*l.* per annum was all usurious interest ? and if they do not, I should be glad to know how much they deem to have been usurious interest, and how much that fair profit, without which bankers must soon cease to be bankers by becoming bankrupts ?

" Upon the whole, I feel that, looking at the circumstances of the case and considering the severe penal consequences attached to the legal crime of usury, I never could, as a judge, advise a jury to find this usury ; and if, being a jurymen, I were so advised by the judge, I do not think I could persuade myself to adopt his opinion, and I am therefore decidedly of opinion, that Messrs. *Ladbroke* and Co. are entitled to stand as creditors for 3,447*l.* 6*s.* 4*d.*"

Mr. *Swanston* and Mr. *Purvis* for the petition.

Mr. *Montagu*, Mr. *J. Russell*, and Mr. *Wright*, for the respondents, were stopped by the Court.

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The CHIEF JUDGE : —

I think this case so far clear as not to render it necessary to hear the counsel for the respondents. I am of opinion that the commissioner arrived at the correct conclusion. If it had appeared that the real intent and agreement of the parties had been that more than five per cent. should be paid, the Court would not have allowed the consequences thereof to be evaded by any colourable transaction. But the assignees have not made out their case. The evidence of the bankrupt does not establish usury. The evidence of the banker is, that he said, " You cannot do less than leave 1,000*l.* in our hands;" and the question is, Whether this were a *bond fide* arrangement connected with the management of the banking transaction, or part of the consideration for the loan of 4,000*l.*, and thus a mask for usury? I agree with the commissioner, that the balance of 1,000*l.* was to be left as a remuneration to Messrs. *Ladbroke* and Co. for managing the banking account. As to the checks being sent to " make up the difference of interest on balance," they were in pursuance of the arrangement that the balance of 1,000*l.* should be kept, which not having been done, the bankrupt sent the amount as a present or compensation. It appears to me that these facts are so far clear as to render an issue unnecessary.

Unless justice demand an issue, the Court will always feel very reluctant to grant one on the application of the assignees, because the costs thereof must fall on the estate.

The Court are reluctant to grant an issue on the application of the assignees.

Sir *John Cross* : —

If the transaction in question stood alone, as a bor-

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rowing and lending of money, and were unconnected with the circumstance of the keeping of the banking account, it might have been difficult to say that it was not usurious, but it appears to me that the whole constituted one transaction.

If a party borrow 4,000*l.* at five per cent., and it be agreed that he shall only receive 3,000*l.*, and shall leave 1,000*l.* in the hands of the lender for any considerable period of time, that might be a usurious transaction. In the present case the object of keeping up a balance of 1,000*l.* in favour of the bankers was to remunerate them for keeping the banking account. The last year's account with the bankrupt was, in round numbers, 108,000*l.*, and leaving a balance of 1,000*l.* was no unreasonable remuneration for the trouble of managing an account of this magnitude, for the interest on 1,000*l.* would be 50*l.*, which is about 7*d.* or 8*d.* per cent., which is little enough. As to the bonus or present at the end of each year, that was to make up for the withdrawal of part of the balance of 1,000*l.* On the whole, it is clear this was a fair transaction, and not a cover for usury.

Sir *George Rose* :— It must not be conceived that our decision rests on the ground, that this, being a transaction between a banker and customer, allows of greater latitude than between any other persons. I agree with the commissioner, that, “ looking at the circumstances of the case, and considering the severe penal consequences attached to the legal crime of usury, I never could, as a judge, advise a jury to find this usury ; and if, being a jurymen, I were so advised, I do not think I could persuade myself to adopt that opinion.” I am therefore of opinion that Messrs. *Ladbroke* and Co. are entitled to stand as creditors.

Mr. *Marshall* appeared for the official assignee, and consented to any order the Court might make; he asked his costs of appearing. He had not been served, but the commissioner directed him to appear.

Per Curiam.:—Generally speaking, the official assignees are not to appear to petitions of this nature. If, in this case, the commissioner certify to us that he actually directed the official assignee to appear, he may have his costs out of the estate, but not if the commissioner merely gave leave or permission.

Petition dismissed. Costs of all parties out of the estate.

This day, at the sitting of the Court, Sir *George Rose* referred to the case of *ex parte Walker*, in the matter of *Petrie, Mont.* Year Book. (a)

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An official assignee, not served, appeared: Held, if the commissioner actually directed him to appear, he might take his costs out of the estate; *secus*, if only leave were given.

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(a) August 1810. *Ex parte* *Petrie*, as attorney for one *William Petrie*, dated Flax Mills, Hounslow, June 6th, 1798, in the words or to the effect following, viz. "Gentlemen,—Having a very considerable manufacture at Hounslow, in company with Mr. *W. Petrie* and another gentleman, upon which above 12,000*l.* has already been expended, and upon which we may want some accommodation in the course of the present year, we request to know whether it will be convenient and agreeable to you to furnish us with what we may want on the following conditions, viz. that you shall never be at any time in advance for us above 3,000*l.*, and that, as long as you

Upon a former petition a reference was ordered to the Master, to inquire what sum was due and owing to Messrs. *Noel, Templar*, and Co., bankers, from the bankrupts.

The Master's report stated, that he found that on the 14th April 1798 an account was opened by the Flax Mill Company with the then petitioners, Messrs. *Noel, Templar*, and Co., as bankers; and that on the 6th of June then following they received a letter, signed by *John Petrie* and by one *Peter Douglas*, and also by *John*

Petrie, as attorney for one *William Petrie*, dated Flax Mills, Hounslow, June 6th, 1798, in the words or to the effect following, viz. "Gentlemen,—Having a very considerable manufacture at Hounslow, in company with Mr. *W. Petrie* and another gentleman, upon which above 12,000*l.* has already been expended, and upon which we may want some accommodation in the course of the present year, we request to know whether it will be convenient and agreeable to you to furnish us with what we may want on the following conditions, viz. that you shall never be at any time in advance for us above 3,000*l.*, and that, as long as you

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Now the present case comes so very near to *ex parte Walker*, that, if the commissioner had found the debt usurious, I, for one, would not have reversed his decision, but, being the other way, I, in like manner, let it stand. It is an exceedingly nice question, and the transaction borders on the very verge of usury. But this Court have decided on the evidence, and on the fact that the contract was not usurious.

are in advance for us at all, we will keep a balance of 500*l.* at least; as the money is received for goods sold, it will be paid into your hands. But it is possible, though not certain, that in the course of the year 1798 we may want 3,000*l.* more than the amount of the sales, for additional works, &c., you will therefore have to discount our note of acceptance for 3,000*l.*, to be drawn for as wanted, and to be received as occasions may require. The discount account will therefore amount to 3,500*l.*, of which 500*l.* at least shall always remain with you, so that the real risk or advance will never exceed 3,000*l.* It shall be at your option to put a stop to this accommodation at the end of eight months, or three renewals, on giving a proper notice to that effect. As an additional security for you, we will deposit in your hands, to remain as long as you are in advance, the lease of the premises, and the policy of insurance made upon them; observing that we have laid out above 3,000*l.* in

buildings, &c. since the purchase of the lease."

The Master then found, that the claim of Messrs. *Noel* and Co. was for 547*l.* 16*s.* 4*d.* arising out of this agreement; and he was of opinion that the said sum of 547*l.* 16*s.* 4*d.* was not really due and owing to Messrs. *Noel* and Co., that sum being the balance of an account current, of which the sum of 3,500*l.* was advanced under a contract, usurious and void by law.

This was a petition to expunge the debt, and there was a cross petition in the nature of exceptions to the Master's report.

The Lord Chancellor said, that whatever might be the custom of bankers when no agreement was made, here was an express agreement which was the foundation of their dealings; this agreement is usurious; the debt must be expunged, and the Master's report confirmed.

Mr. *Richards*, Mr. *Hart*, and Mr. *Daniel* for the assignees.

Sir *S. Romilly* and Mr. *Wingfield* for Messrs. *Noel* and Co.

The CHIEF JUDGE:—I wish to be understood, that if the keeping a balance of 1,000*l.* had formed part of the contract for lending the 4,000*l.* that it would have been usurious. But my opinion was and is, that it was a term of arrangement as to the banking account subsequently introduced and for the convenience of the parties.

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Per Curiam:—It was a mere question of fact, to be collected from the evidence; on this the judgment of the Court is founded.

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THIS was a petition to prove.

In 1799 the bankrupt executed a bond for 1,100*l.* to certain trustees, reciting that he was to receive 550*l.* as his wife's fortune, and had agreed to give the bond in consideration thereof, and in order to make a provision for her and the children of the marriage. The condition of the bond was, "that if the said bankrupt, his heirs, executors, or administrators, did and should, after the expiration of three months from the celebration of the said intended marriage, *on receiving notice from them the said trustees for that purpose*, well and truly pay or cause to be paid unto them the said trustees, &c., the full sum of 1,100*l.* upon the trusts herein-after mentioned. [Here were inserted trusts of the interest in favour of the bankrupt for life, and after his death of his wife for life, and then for the children, &c.] But in case the said bankrupt should happen to depart this life before the said sum of 1,100*l.* shall be paid to the said trustees, then if the heirs, executors, or administrators

A bond is proved, given by the bankrupt in consideration of his wife's fortune, that he, his heirs, &c., would, within three months from the marriage, on receiving notice from the trustees, pay them 1,000*l.*, to be held on the trusts of the marriage settlement, though no notice was given before the bankruptcy.

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of the said bankrupt do and shall, within three months next after his decease, pay or cause to be paid to the said trustees, &c. the said sum of 1,100*l.* to, for, and upon the trusts, interests, and purposes herein-before mentioned, expressed, and declared of and concerning the same, then the above-written obligation to be void," &c.

The marriage took place, and the 550*l.* was paid to the bankrupt. In 1831 a commission issued against him.

In 1831 the petitioners, the trustees, tendered their proof for 1,100*l.*, which was rejected by the commissioners, on the ground that notice had not been given to the bankrupt.

In 1832 the bankrupt died.

This was an appeal from the decision of the commissioners.

Mr. *Swanston* and Mr. *Stinton*, for the petition, stated, that the objection made to the proof was, that the debt was contingent on the notice being given, and that no notice had been given; and having cited *ex parte Fairlie*, Mont. 17, *ex parte Lancaster Canal Company*, Mont. 27, *ex parte Tindall*, 8 Bing. 402, and *ex parte Grundy*, Mont. & Mac. 293, were stopped by the Court.

Mr. *Twiss* and Mr. *Montagu* for the assignees:—

The sum in question was not proveable until after notice, and notice was not given till after the bankruptcy. The words of the bond are, "that if the said *West*, his heirs, executors, and administrators, did and should, after the expiration of three months from the marriage, on receiving notice from the trustees for that purpose, well and truly pay," &c.

There are two modes of considering this question :
1st, without relation to section 56 of 6 Geo. 4, c. 16,
the clause relating to contingent debts; and, 2d, by
considering the operation of that clause.

1st. Without relation to section 56.

The cases are uniform in deciding that, when a debt
is not payable until notice has been given, and the
bankruptcy occurs without notice having been given,
either directly or by implication, the debt is not
provable.

In *Utterson v. Vernon*, 1792, 4 T. R. 570, *A.* lent
stock to *B.*, to be replaced as stock, without naming
any particular day, and *B.* became a bankrupt before
any request by *A.* to replace the stock, it was held that
A. could not prove under *B.*'s commission, Lord *Kenyon*
saying, "Here the stock was to be replaced at the
request of the plaintiff who lent the stock, and no such
requisition having been made previous to the bank-
ruptcy, no certain debt arose, but it rested altogether in
damages to be ascertained by a jury."

The case of *ex parte Mare*, 1803, 8 Ves. 335, very
closely resembles the present. By articles made pre-
vious to marriage, in consideration of the wife's fortune,
and for making a provision for the wife if she should
survive, and for the issue, the intended husband cove-
nanted that he and his heirs would, within seven years
after the marriage, or when requested, convey and assure
to the trustees, &c. lands of the yearly value of 80*l.*, to
the use of the intended husband for life, and after his
death for his wife for life, and then for the children in
strict settlement. The marriage took place, but no
estates were purchased, nor was any request made. The
wife died, leaving several children, and the husband
afterwards became bankrupt, whereon the trustees and
children petitioned to be allowed to prove for such sum

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as would purchase lands worth 80*l.* per annum. Lord *Eldon* said, there was no doubt that, under an agreement to replace stock on demand, if the demand be made before the bankruptcy, the price of the stock may be proved; his Lordship refused to make any order, and the petition was dismissed.

In *Nicholls v. Bromley*, 1821, 2 *Brod. & Bing.* 464, a warrant of attorney was given, the defeazance of which was as follows: "The within warrant of attorney is given by the within-named *W. Bromley*, to secure the payment of the sum of 1,000*l.* on demand; and in case default shall be made, then judgment may be entered up hereon, and execution issue for the said sum of 1,000*l.*, or so much thereof as shall be then due, together with all costs," &c. The plaintiff's attorney waited on the defendant to induce him to settle matters amicably, which attempt having failed, he issued execution the next day. *Onslow*, Serjeant, having obtained a rule to set aside this judgment, *Vaughan*, Serjeant, shewed cause against the rule, and argued, that the expression, "payment on demand," was only formal, as in a bond, and that the process of law was of itself a sufficient demand. At all events, the attempt to settle amicably amounted to an actual demand. But the Court thought it appeared, from the stipulation, that execution should not issue till default had been made; that an actual demand was intended by the parties, and that no demand was shewn to have been made, and the judgment was set aside.

Where interest has been paid before the bankruptcy, the Court has always considered that equivalent to a demand, so as to make the debt proveable. Thus in *ex parte Spurling*, 1794, *Cooke*, 159, a bond was given for a sum payable on demand, and interest was paid thereon, but no demand of payment ever made; but

the debt was held proveable. In *ex parte Elgar*, 2 Gl. & J. 1, money was lent on the following note: "I promise to pay Mr. E., or order, after three months notice, 150*l.*, together with interest due thereon at 5*l.* per cent." After payment of two years interest, but before any notice given, the maker of the note became bankrupt. Lord Eldon ordered the debt to be proved, saying, that he had conversed with the Judges on the subject, and that, in concurrence with them, he thought the payment of interest was to be considered as evidence that the parties had dealt with the notes as an immediate debt.

Ex parte Downman, 1826, 2 Gl. & J. 85 and 241, was a petition to prove on the following note:—

"£400.

"Borrowed and received of S. D., August 20, 1816, 400*l.*, which I promise to repay, with five per cent. interest for the sum. It is agreed that six months notice shall be previously given."

After payment of interest the maker of the note became bankrupt. The Vice-Chancellor thought the debt not proveable, but the Chancellor (Lord Lyndhurst) reversed that judgment, saying, "By the payment of interest this is clearly *debitum in presenti solvendum in futuro*. This was the opinion of Lord Eldon in *ex parte Elgar* (a), and by that case I feel myself bound; and the case before the Court seems the same in principle. At the time the Vice-Chancellor gave judgment in the present case, as reported, neither *Clayton v. Gosling* (b) nor *ex parte Elgar* (a) had been decided, or I have no doubt those decisions, especially the latter, would have influenced his Honor's decision, since it was the result, not only of Lord Eldon's own judgment, but

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(b) 5 Barn. & Cres. 360.

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of a conference between his Lordship and the Judges in the courts of law."—And even if no notice be given, or interest paid, the debt will be proveable on a promissory note, if the note contain the words "value received, with lawful interest," as the legal operation of such note is to make it a debt with interest to be computed, not from the time of the notice given, but from the date of the note. This is settled in *Clayton v. Gosling*, 1826, 5 *Barn. & Cres.* 360, in which case a note was given in following terms: "On having twelve months notice, we jointly and severally promise to pay Mr. J. C., or order, 200*l.* for value received, with lawful interest." No notice was given, nor did any interest appear to have been paid, but the debt was held to be proveable, as the words "value received" imported value received from the payee, and therefore constituted an immediate debt; and Lord *Tenterden* said, "As the note is payable with interest, the case is free from the difficulties which might occur as to the rebate had the note been payable without interest;" and *Bayley, J.*, said, had the interest been payable from the notice it might have been different, but the interest was payable from the date of the note, and the case was therefore without difficulty.

In *ex parte Fairlie, Mont.* 17, the decision was that the debt was not proveable, it being intended by the parties that an actual demand should be made. Admitting, therefore, for the sake of argument, that although a debt on a note payable on demand is proveable although no demand be made — *Rumball v. Ball*, 10 *Mod.* 38, *ex parte Beaufoy, Cooke*, 170,—yet where it is from a surety or party who stipulates for notice, then notice must be given to make the debt proveable; and in the present case the parties did so stipulate, as in *ex parte Mare*, 8 *Ves.* 335.

In commenting on *ex parte Lancaster Canal Com-*

pany, Mont. 34, upon the stipulation as to interest, the counsel say, "it must be remembered that in these cases the securities expressly provided for the payment of principal and interest, and that interest was actually paid. There was an irresistible presumption, therefore, that notice had been given." But, in the case before the Court, notice was not given, and there was no stipulation in the bond that interest should be paid.

2dly, *As to the contingent clause*, 6 G. 4, c. 16, s. 56.

The present case is not a debt on a contingency within the intention of the legislature. This was incidentally mentioned in argument, and confirmed by the decision being on a different ground, in *Clayton v. Gosling*, 5 Barn. & Cres. 361, where the counsel said, "It was not a debt upon contingency within the meaning of the cases cited. In them, either the amount of the debt was not ascertained, or the time of payment was uncertain, and did not depend on the will of the creditor. Here the amount to be paid was ascertained, and the creditor by giving notice might at any time fix the day of payment." Had not the Court imagined this reasoning to be correct, the decision would not have been on another point attended with considerable nicety and difficulty; but if any doubt be entertained with respect to this inference, the principle of the clause is clear.

The legislature interposed to protect creditors whose right to payment depended on a contingency arising out of the acts of others, or on circumstances over which the creditors had no control; not to a case like this, where the contingency depended on the act of the party himself. The legislature could not have intended to interpose to encourage the dormant.

Mr. *Swanston*, in reply, was stopped by the Court.

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If *Clayton v. Gosling* (a) had never been decided, and the 6 Geo. 4, c. 16, s. 56, had never been passed, then the authority of Lord *Eldon* in *ex parte Elgar* (b) would have had the greatest weight with me, though even there, that it would not be proveable, is merely a doubt thrown out, not the decision itself; but the later case of *Clayton v. Gosling* is conclusive in favour of the petitioner. In that case the Court concluded, as of course, that the debt being payable on demand, the time certainly would arrive, as the demand certainly would be made, that reasoning is conclusive in the case before the Court. What commissioner would feel any difficulty in putting a value on a debt in a sum certain payable the moment a demand is made? The decision in that case had reference to a date anterior to the passing of the statute 6 Geo. 4, c. 16. The 56th section of that statute removes the foundation of the doubt expressed by Lord *Eldon* in *ex parte Elgar*. (b)

The prayer of this petition must be granted.

Sir *John Cross* :— The question is, whether there were a debt existing before the bankruptcy? The condition of the bond recites, that in consideration of 550*l.* the wife's fortune, the husband has agreed to pay 1,100*l.* whenever a demand is made; consequently the time of payment alone is postponed. This debt is proveable under section 51, being a debt contracted for valuable consideration, though not payable at the time of the bankruptcy. But if any doubt exist as to its being proveable under section 51, then it clearly would be proveable under section 56. But it appears to me, beyond all doubt, that the bankrupt contracted a debt the moment he signed the bond.

(a) 5 *Barn. & Cres.* 360.

(b) 2 *Gl. & J.* 1.

Sir *George Rose* concurred.

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Mr. *Swanston* asked that the petitioner might be allowed his costs out the estate.

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Mr. *Montagu* :—The invariable practice has hitherto been never to allow costs to a petitioner succeeding against the decision of the commissioners when they have properly exercised their jurisdiction ; a rule which was followed in *ex parte Millington*, ante, page 114. The assignees were bound to support the judgment of the commissioners.

The CHIEF JUDGE :—The assignees, who represent the estate, improperly resisted this proof, and we order the estate to bear the costs. In *ex parte Millington* we thought the debt doubtful ; here we do not. This is a proof which ought not to have been resisted ; and the assignees having forced the petitioner to come here, makes this case proper to be brought within the exception to the general rule ; which general rule is that a party succeeding against the decision of the commissioners must bear his own costs ; a rule which unquestionably exists, and which I think a good rule.

Sir *John Cross* :—*Ex parte Millington* was a case decided under very peculiar circumstances, and ought not to be considered as breaking in on the general rule, or as being obligatory on the Court on future occasions. I think it injurious to justice to report such cases as *ex parte Millington*, in which the circumstances were very peculiar. When reported it will have a marginal note, laying down a general rule, which will be cited as proper to guide the Court in future, and thus tend to

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deprive the Court of its discretion as to costs, which is expressly given by the statute. (a)

Sir *George Rose*:—No doubt the general rule of courts of equity is, that the unsuccessful party must pay the costs; but this rule is frequently relaxed when there exists some fund out of which the costs may be paid. In bankruptcy cases the estate is that fund, and enables the successful party to have his costs thereout, though he succeed against the decision of the commissioners. The general rule in bankruptcy is, that the party succeeding against the decision of the commissioner must pay his own costs. That rule has lately been relaxed in certain peculiar cases; but the general rule will always be adhered to, unless the Court thinks the petitioner ought not to have been resisted.

Per Curiam:—The costs of all parties may be taken out of the estate.

Ordered as prayed. Costs of all parties out of the estate.

(a) That all costs of suit between party and party in the said Court of Review shall be in the discretion of the Court. 1 & 2 W. 4, c. 56, s. 5.

Q. 1. Were not such costs always in the discretion of the Court?

Q. 2. If so, of what use is this clause?

Legis tantum interest ut certa sit, ut absque hoc, nec justa esse possit. Si enim incerta vocem det tuba quis se parabit ad bel-

lum? Similiter, si incertam vocem det lex, quis se parabit ad parendum? Ut moneat igitur oportet, priusquam feriat. Etiam illud recte positum est, *optimam esse legem, quæ minimum relinquit arbitrio judicis*: id quod certitudo ejus præstat.—Baconis De Aug. Scien. lib. 8. aphoris. 8.

Etenim optima est lex, quæ minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi.—Ib. Id. aphoris. 8.

Ex parte LUCAS. — In the matter of OLDHAM.

C. of R.
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MR. SWANSTON and Mr. Stinton moved to amend the minutes of the order in this matter by striking out the words "and the several affidavits which were read;" the case having been argued as on a demurrer (a), and no affidavits being in fact read.

All affidavits
filed are con-
sidered as read,
on the question
of costs.

Per Curiam: — The order is drawn in the usual form: all affidavits filed are considered as read.

Ex parte WYATT. — In the matter of WYATT.

C. of R.
April 22,
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THIS was a petition to supersede and annul the fiat. The petition stated that *Wyatt* was not a trader.

That the petitioner was a creditor of *Wyatt* to the amount of 2,000*l.* and upwards, for money lent, &c.

That the fiat was issued for the purpose of defeating the rights of the petitioning creditor, in obtaining payment of the said debt.

A petition to
supersede by a
creditor, pre-
sented a year
after the bank-
rupt has ob-
tained his certi-
ficate, cannot be
heard, unless
the delay be
accounted for.

Mr. *Arnold* for the assignees.

Mr. *Swanston* and Mr. *Wright* for the petitioning creditor.

Mr. *Montagu*, for the bankrupt: —

There are two preliminary objections.

1st. The petitioner is not a creditor; he has stated himself to be a creditor, which the bankrupt has denied; and the petitioner has not answered the bankrupt's affi-

(a) See *ante*, page 93.

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WYATT.

davit; and the bankrupt's examination taken before the commissioners shows that the petitioner is not a creditor.

It is the constant practice to dispose of this preliminary objection before the petition is heard, not only to save the time of the Court, but to prevent the injustice of harassing the bankrupt, who has seldom means to defend himself, by a party who may have no right to institute proceedings against him. In *ex parte Fowles, Buck. 98*, a petition was presented to supersede; the preliminary objection was taken that the petitioner had not proved himself to be a creditor, for though he had so sworn in his affidavit, yet that was contradicted by the examination of the bankrupt before the commissioners; the Vice Chancellor permitted the examination to be read, and it being found to contradict the affidavit of the petitioner, an inquiry was directed, whether the petitioner were or not a creditor; and, in *ex parte Hudson, 2 Russ. 456*, a petition to supersede was presented, and the debt of the petitioner was impeached on the ground of being usurious, and the Court held, the validity of his debt must be established before the Court proceeded to inquire into the validity of the commission on his application.

Per Curiam :—

The objection that the petitioner is not a creditor is not strictly preliminary.

The present objection may occasionally have been treated as preliminary, as a matter of convenience, and to save time; and where it was obvious the party was not a creditor; but it is not strictly preliminary to the hearing the petition.

If it appears to the Court, under all the circumstances stated in the affidavit, that the petitioner is a creditor, it will be sufficient. If the petitioner do not prove himself a creditor, his petition will be dismissed with costs.

Mr. *Montagu* : — The second preliminary objection is that the bankrupt has obtained his certificate upwards of twelve months, and as the petitioner does not charge him with any fraud, the certificate is a bar; *ex parte Crowder*, 2 *Rose*, 324.

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Mr. *Twiss* and Mr. *E. Chitty*, for the petitioner, insisted that there was in fact a charge of fraud; the petition stated that the fiat was issued for the purpose of defeating the rights of the petitioner in obtaining payment of his debt; and the affidavits in support distinctly charged the bankrupt with having fraudulently concocted a trading for the purpose of being made a bankrupt, and to obtain a discharge from his debts through his certificate.

Sir *George Rose* : — Do the affidavits explain why the petitioner has suffered twelve months to elapse without petitioning?

Mr. *Twiss* admitted they did not.

Per Curiam : —

If a bankrupt have concocted a fraudulent bankruptcy in order to procure a discharge from his debts through a certificate, then the fact of his having obtained such certificate would be no objection to a petition to supersede presented by a creditor. (a) But the only statement in this petition implying fraud is, that “the fiat was issued for the purpose of defeating the rights of the petitioner in obtaining payment of the said debt.” Now, even suppose the petition had directly and clearly charged

The certificate obtained under a fraudulent commission is no protection against a petition to supersede.

(a) See *ex parte Gillman*, 2 *Cox*, 193; *ex parte Poole*, 2 *Cox*, 230; *ex parte Moule*, 14 *Ves.* 602.

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of
WYATT.The office of
affidavits is to
explain allega-
tions of the pe-
tition, and can-
not supply the
want thereof.

a "fraud," (a) yet who would have been charged with fraud? Why, the petitioning creditor, not the bankrupt. And where is the fraud in such a purpose in the absence of collusion with the bankrupt?

But it is said, that though on the face of the petition there be no direct charge of fraud against the bankrupt, yet that it is established by the affidavits; but the office of affidavits is to support the allegations of the petition, and cannot be used to supply an absolute want of allegation. Nevertheless, if this were the only objection, we might probably, in our discretion, permit the petition to stand over to be amended by inserting an allegation of fraud on the part of the bankrupt. But as no reason is given for the petitioner's delay in not coming here till twelve months after the certificate was obtained, this petition must be

Dismissed with costs.

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April 22,
1834.*Ex parte* SOMERVILLE.—In the matter of
LOSCOMBE.

Quare, whether the commissioners can convey an estate tail after the death of the bankrupt?

The commissioners would not do wrong in executing a conveyance, to enable the question to be tried.

IN 1783 a commission issued against *Loscombe*; he was tenant in tail of certain estates, which he had mortgaged before his bankruptcy to his partners, who were bankers. The usual bargain and sale to the assignees was not executed under this commission.

In 1796 the bankrupt died.

In 1826 a renewed commission issued, and in 1827 the common bargain and sale was made to the assignees.

In 1833 the mortgaged premises were sold under the usual order of the commissioners, and produced only about one-fourth of the mortgage money.

(a) As it was in *ex parte Crowder*, 2 *Rose*, 524.

The purchaser contended that the premises, being entailed, did not vest in the assignees by the common bargain and sale, and insisted on a special conveyance from the commissioners, under the 65th section of 6 Geo. 4, c. 16. (a) The commissioners declined to execute such conveyance. Their reasons are set forth in the following memorandum, entered with the proceedings.

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“ We, whose names are hereunto subscribed, being the major part of the commissioners, &c. being informed by Messrs. *Clarke* and Sons, the solicitors to the renewed commission, that they have received from the solicitors to the mortgagees a case laid before Mr. *Swanston*, together with his opinion, and having heard the said case and opinion read, and having referred to our memorandum of the fifth of September last, we think that whether we ought to execute a conveyance to the purchasers, depends on the question whether that conveyance, if executed, would bar the issue in tail, and we think it would not, for the following reasons. First, the 6th George the 4th, chapter 16, section 65, enacts: ‘ That the commissioners, by deed indented and enrolled, shall make sale for the benefit of the creditors of any lands, &c. whereof the bankrupt is seised, of any estate tail in possession, reversion, or remainder, and whereof

(a) That the commissioners shall, by deed indented and enrolled as aforesaid, make sale for the benefit of the creditors as aforesaid, of any lands, tenements, and hereditaments situate either in England or Ireland, whereof the bankrupt is seised, of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown; and every such deed shall be good against such bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or any other means, might cut off, or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, and hereditaments. 6 G. 4, c. 16, s. 65.

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no reversion is in the crown ; and every such deed shall be good against the bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or other means, might cut off or debar from any remainder, reversion, or other interest, in or out of the said lands,' &c.; and we think that this clause does not extend to bar the issue in tail, where the conveyance to the purchaser shall not have been executed until after the death of the bankrupt ; the statute speaks of a seisin by the bankrupt at the time when a conveyance is executed to bar an entail, and has no retrospective words, and therefore we think it does not authorize the commissioners to convey.

“ In the case of *Pye v. Daubuz*, 3 Bro. C. C. 595, and also in the case of *Edwards* and *Appleby*, 2 Bro. C. C. 652, it does not appear that the bankrupt died before the bargain and sale was executed, and in each of these cases the decisions were, as to the first, in favour of the trustees, and, as to the second, in favour of the mortgagees, on the ground that there was a covenant for further assurance, by which the estate in each case was bound ; but in the present case, though there is a covenant for further assurance, yet we think it would bind only the bankrupt and his general heirs, and not the issue in tail after the death of the bankrupt ; and we infer from the case of *Beck v. Welch*, 1 Wils. 276, that the death of the bankrupt before the execution of a conveyance to bar the estate tail, would, upon the reasoning there held, put an end to the mortgagee's title. It may also be observed, that the provisions of the act for abolishing fines and recoveries, 3d and 4th William 4th, chapter 74 (a) (not yet in force), sections 55 to 73, confirmatory of the opinion above expressed, inasmuch

(a) See Appendix to *Mont. & Bl.*

as a disposition by the commissioners of the estate tail of the bankrupt is, in the case of it being executed in the lifetime of the bankrupt, made to operate as a bar not only as against the issue in tail, but also against those in remainder and reversion; whereas, if executed after the decease of the bankrupt, its operation is limited to the issue in tail, by which it appears that the legislature contemplated a material distinction between the two cases, not provided for by any previous act of parliament.

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“ T. SMITH.

“ J. G. SMITH.

“ EDW. DANIELS.”

This was the petition of the surviving executors of the mortgagee, and prayed that the commissioners might be directed to execute a conveyance, and that the monies to arise therefrom might be paid to the petitioners.

Mr. *Swanston*, for the petition : —

In this case all parties are aware that considerable difficulties exist.

The 64th section of 6 Geo. 4, c. 16, authorizes the commissioners to convey to the assignees all interest in lands, tenements, and hereditaments to which the bankrupt is entitled, and of which he might have disposed; and the 26th section of the same statute enacts, that “ if any bankrupt shall die after adjudication, the commissioners may proceed in the commission as they might have done if he were living.” As the bankrupt died before the 6 Geo. 4, c. 16, passed, one question is, whether the 26th section be retrospective? The words of the words of the act are, “ shall die;” if they had been, “ shall die, or shall have died,” no doubt could exist. But considering the general intent which appears throughout the 6 Geo. 4, c. 16, it may safely be con-

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tended that sec. 26 would be retrospective, even if introductory of a totally new provision ; but it is in substance a re-enactment, in a compressed form, of the 17th sec. of 1 Jac. 1, c. 15, which enacted, "that after any commission of bankrupts hereafter sued forth and dealt in by the commissioners, the offender happen to die before the commissioners shall distribute the goods, lands, and debts of the offenders, or any of them, by force of the aforesaid statute of the thirteenth year of the reign of our late sovereign lady Queen Elizabeth, and this statute or either of them, that then nevertheless the said commissioners shall and may, in that case, proceed in execution, in and upon the said commission for and concerning the offender's goods, lands, tenements, hereditaments, and debts, in such sort as they might have done if the party offender were living." The 26th section of 6 Geo. 4, being a re-enactment of a repealed statute, it is retrospective according to the general rules and principles of construction. (a) Where the legislature intended that the 6 Geo. 4, c. 16, should not have a retrospective operation that intent is expressed, as in sections 57, 96, and 98.

Billinghurst, (b) p. 111, sect. (44), speaking of what the commissioners may convey, says, "It is made by Mr. Stone a query in his lecture, that if there be two jointly [seised], and the one become bankrupt, and die, whether his part shall be sold because the survivor is not in by him? But it seems to me that the bankrupt's part shall be sold, and that there shall be no survivor in

(a) See the judgment of Chief Justice Tindal in *Rees v. Goodwin*, 6 Bing. 584; Lord Lyndhurst's judgment *ex parte Grundy*, *Mont. & Mac.* 293; *Bell v. Bilton*, 4 Bing. 615; and *Cumming v. Wells*.

(b) Judge's Resolutions on the Statutes concerning Bankrupts, by *Billinghurst*.

this case; first, because the bankrupt's moiety is bound by the statutes by his becoming a bankrupt; secondly, the bankrupt had power to sell the same in his lifetime, and might depart with it; and so within the words of 13 Eliz. cap. 7, the words [of which] are, "Such use, interest, right, or title as such offender or offenders that shall have in the same, which he or she may lawfully depart withall;" thirdly, by 1 Jac. chap. 15, the commissioners, after the bankrupt's death, may proceed in execution in and upon the commission for and concerning the offender's lands, tenements, &c. in such sort as if the offender had been living, which they cannot do in the case before if the survivorship took place."

In *Doe d. Spencer v. Clark*, 5 Barn. & Ald. 458, the bankrupt was entitled to a fee simple conditional at common law in certain copyhold lands, and it was held that the commissioners could pass his interest by executing the common bargain and sale to the assignees after his decease, pursuant to 1 Jac. 1, c. 15, sect. 17; in that case a question arose, whether in fact the interest of the bankrupt were an estate tail or a fee simple conditional, it was held to be the latter; and *Holroyd and Bayley*, Justices, said it was not necessary to determine in that case whether an estate tail could be divested after the death of the bankrupt by a bargain and sale executed by the commissioners after his death.

In *Jervis v. Tayleure*, 3 Barn. & Ald. 557, on a joint commission against a tenant for life and a tenant in tail in remainder, it was held that the interest of both were passed by the common bargain and sale executed by the commissioners to the assignees, so as to vest the life estate in them and base fee in remainder.

Finally, if the Court should be of opinion that the case is doubtful, then the creditors should have the

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benefit of that doubt, in pursuance of the 135th clause of 6 Geo. 4, c. 16, which enacts, "That this act shall be construed beneficially for creditors, and that nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared; and that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specially enacted."

Mr. *Montagu*, for the commissioners : —

Estates tail, not being within the 64th section of 6 Geo. 4, c. 16, were not passed to the assignees by the common bargain and sale, and required a special provision, which is to be found in sect. 65 of the same statute, which enacts, "That the commissioners shall, by deed indented and enrolled as aforesaid, make sale for the benefit of the creditors as aforesaid, of any lands, tenements, and hereditaments, situate either in England or in Ireland, whereof the bankrupt is seised, of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown; and every such deed shall be good against the said bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery, or any other means might cut off or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, and hereditaments."

This power to commissioners to bar an estate tail by a conveyance was first introduced by 21 Jac. 1, c. 19, s. 12, in the year 1623, and was thence transferred to the 6 Geo. 4, c. 16, and always has been perfectly separated from the power to convey the other estates to the assignees, who were not introduced till long subsequently, and the two powers have always been kept separate. Indeed, the bargain and sale under sect. 64 of 6 Geo. 4, c. 16, would not bar an entail.

The common bargain and sale to the assignees is an innocent conveyance, and operates to pass actual legal rights, and could only pass what the bankrupt could have passed by a bargain and sale, that is, an interest during his own life. The estate in question was an estate tail; the bankrupt is dead, and therefore the commissioners do not feel themselves justified in executing a conveyance.

In addition to these circumstances, the issue in tail are not before the Court, and no decision can be made to effect them in their absence.

The commissioners have but one wish, to act so as not to injure any person, or to impede any one seeking to establish his right. They wish the protection of the Court. They cannot convey an estate if they have not the title, and if they have the title, they are ready to assign it, if that ought to be done.

This day the petition was again called on.

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Ex parte
SOMERVILLE.
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LOSCOMBE.

May 7.

THE CHIEF JUDGE:—I am of opinion that the bargain and sale, executed by the commissioners, vested in the assignees all that the commissioners have the power to convey. In *Edwards v. Appleby*, 2 Bro. C. C. 652, and in *Pye v. Daubuz*, 3 Bro. C. C. 595, there was only

The common bargain and sale to assignees passes an estate tail of which the bankrupt was possessed.

1834. the common bargain and sale to the assignees. Those cases were decided by Lord *Northington* and by Lord *Thurlow*, neither of whom discovered any difficulty on that account. The commissioners can do no harm by joining in the special conveyance to the petitioner; but this Court ought not to order them to do so, unless it is satisfied that there is some part of the bankrupt's estate which they ought, but have refused, to convey.

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Sir *John Cross* : — The bargain and sale made by the commissioners to the assignees conveys, in general terms, all the property of the bankrupt. The words of 6 Geo. 4, c. 16, s. 65, are, " That the commissioners shall, by deed indented and enrolled as aforesaid, make sale for the benefit of the creditors as aforesaid," &c. As this section does not more particularly point out what the commissioners are to do, it may be considered that a bargain and sale duly enrolled is a " making sale for the benefit of the creditors," and equivalent to a separate bargain and sale of the premises entailed alone.

Sir *George Rose* : — If I were one of the commissioners in this case, I should feel no difficulty in executing the conveyance the petitioners ask, as it would place them in a situation to try their rights at law. At the same time, I am of opinion that the bargain and sale already executed has passed every thing, consequently that the conveyance now asked would have nothing on which to operate; it might therefore become a question, whether, on the whole, the better course to pursue would not be to vacate the existing bargain and sale, and execute a new one, drawn with reference to the existing circumstances of this case.

Per Curiam:—It is unnecessary to make any order unless the commissioners desire it for their protection, in which case an order will be made on consent.

The Court intimate to the commissioners that they may execute the conveyance to the petitioners. Costs out of the estate.

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Ex parte
SOMERVILLE.
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of
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Ex parte DAKINS.—In the matter of HUGHES.

C. of R.
April 25,
1834.

ON the afternoon of the 24th of April, Messrs. *Johnson* and *Weatherall* received docket papers from the country, with instructions to strike a docket against *Hughes*.

Before six o'clock, and before the opening of the office, *Weatherall* went to the secretary of bankrupt's office to strike the docket, and there met *Back*, the agent of another solicitor, who had also come for the purpose of striking a docket against *Hughes*.

The affidavit of the petitioning creditor in *Back's* docket papers was sworn before the solicitor to the petitioning creditor; for this reason *Weatherall* insisted that the secretary of bankrupt's should receive his (*Weatherall's*) docket papers, and not require lots to be drawn (a), which the secretary refused. *Back's* docket papers were received, but not entered. It being neces-

A. tendered docket papers, of which the affidavit of debt was sworn before the solicitor to the petitioning creditor; at the same time *B.* tendered papers not so sworn; they drew lots, and the lot fell to *A.*, whose papers were entered. The Court refused to interfere to give the fiat to *B.*

(a) "That in case two or more persons shall apply at the same time to strike a docket against the same person, and both of them shall be prepared to sue out a commission forthwith, that then it shall be determined by lot which person shall sue out such commission." Lord *Eldon's* order, April 15, 1815.

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Ex parte
 DAKINS.
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 of
 HUGHES.

sary that one set of papers should be entered, and to prevent any third party stepping in, *Weatherall* and *Back* next day agreed to draw lots, without prejudice; the lot fell to *Back*, whose papers were thereon entered. There was an erasure in the bond tendered by *Weatherall*.

This was an application by *Weatherall*, that his docket papers might be received at the office.

Mr. O. Anderdon for *Weatherall*:—

There are two precedents directly in favour of this application.

The first is *ex parte Paynter* (a), decided by Lord *Eldon*. There two sets of docket papers were tendered, and lots drawn; the losing party afterwards discovered the affidavit of the other side to have been sworn before the solicitor to the petitioning creditor, which the losing party's was not, and Lord *Eldon* gave the commission to the latter.

The other case was also decided by Lord *Eldon* two years afterwards, *Anon. Mont.* 136. There a docket was tendered at the office, on an affidavit sworn before the solicitor to the petitioning creditor; at the same time, another docket was tendered on an affidavit not so sworn, and the latter docket was preferred.

Mr. *Swanston*, for *Back*, urged there must have been

(a) Lord Chancellor, June 25, 1825. *Ex parte Paynter*, in the matter of *Willoughby*. Two sets of docket papers tendered, and lots drawn; the losing party afterwards discovered the affidavit of the other side to be sworn before the solicitor applying for the commission, and went to the Court. Lord *Eldon* gave the applicant the commission, though the first was sealed. MS. Mr. *Barber*.

some peculiar circumstances, such as fraud, &c. in *ex parte Paynter*. In *ex parte Elford*, 2 Gl. & J. 65, an application to supersede, because the affidavit was sworn as this is, was dismissed; the words of the report are, "The Lord Chancellor decided, after consideration, that it was not a valid ground of objection to docket papers, that the affidavit of debt, on striking the docket, had been sworn before the solicitor suing out the commission." (a)

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of
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The CHIEF JUDGE:—No doubt *ex parte Paynter* is a strong case; so strong that, if I could be sure it was divested of peculiar circumstances, it might perhaps govern the present. The objection is entirely technical, and as there are some little technical faults in the bond of *Weatherall's* client, and as the lot has given the docket to *Back*, I think the lot should decide the question, and that the Court should not interfere.

Sir John Cross:—In *ex parte Elford* Lord Eldon thought it entirely a question of discretion. There must have been some material circumstances in *ex parte Paynter*. There are slight irregularities on both sides, and the lot is a good mode of decision in this case.

Sir George Rose:—The practice is well settled. In adverse litigation an affidavit cannot be sworn before the solicitor to the party; which rule does not apply when there is no adverse litigation; an affidavit to hold to bail may be sworn before the solicitor to the party. Any slight matter might have guided Lord Eldon's dis-

(a) The same point was raised *Etheredge*, December 20, 1825, (i. e. whether the Court would and in *re Whittle*, February 23, supersede) in *ex parte Ivison, re* 1826, with a like result.

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DAXINS.In the matter
of
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cretion in *ex parte Paynter*, such as knowing one solicitor better than another, &c.

Per Curiam : — *Ex parte Paynter* defends the applicant from costs.

Motion refused. No costs. (a)

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& 26.
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Ex parte DEVAS and EVANS, and WILLIAMS
on behalf of himself and *Lawless*, his co-assignee.—
In the matter of KENTON.

It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of the assignees, &c. under the first.

THIS was a petition by two creditors and one of the assignees under a commission, praying that a subsequent fiat might be superseded.

On the 26th of June 1823 a commission issued against *Kenton*, then trading at Stowe, Gloucestershire, under which the only creditor who proved was *Shiers*, for 130*l.*, which was for a debt due to himself and his partner. *Shiers* chose himself assignee, and paid himself in full. At this time *Devas* and *Evans* were creditors for 200*l.*, but did not prove. It also appeared by *Kenton's* balance sheet that he had other creditors, to the amount of 1,000*l.*, but none of them ever applied to prove.

On the 26th of September 1826 a commission issued against *Shiers*, under which the petitioner *Williams* and *Lawless* were chosen assignees. *Shiers* resided in America, and was not expected to return. On the 9th of May 1832 a fiat issued against *Kenton*, then trading at Poplar, Middlesex. The petitioners were not informed of the issuing of the fiat till the end of January 1834.

(a) See *ex parte Schofield*, 2 *Rose*, 246, and *ex parte Cossart*, 1 *Gl. & J.* 248.

On the 11th of February 1834 the petitioners gave the assignees under the fiat notice of the commission of 1826, &c. and desired them not to dispose of the assets, &c.; but on that day a dividend was declared under the fiat.

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The petition alleged that the assignees under the fiat of 1832 had possessed themselves of property distributable under the commission of 1826, and prayed that the assignees under the fiat of 1832 might be restrained from paying the dividend declared; that a meeting might be held, under the commission of 1826, for a new choice of assignees in the room of *Shiers*, and that the assignees under the fiat of 1832 might deliver to such new assignees, when chosen, all assets, &c. in their hands; and that the fiat should be annulled.

Kenton, who was outlawed under the fiat for not surrendering, could not be found, and was not served with the petition.

The petition was signed “*Williams*, for self and co-assignee *Lawless*.”

Mr. *Swanston* and Mr. *Bethell* for the respondents:—

There are five preliminary objections to this petition.

1st, It is multifarious; it prays relief, first, under the commission, viz. that a new assignee may be elected; and, second, under the fiat, viz. that the assignees may deliver up property, and account.

2d, There are no proper parties to the petition. *Devas* and *Evans* are not creditors under the commission, not having proved; and *Williams* alone does not represent *Shiers*, who is the interested party, being the assignee under the commission of 1826.

3d, The signature is defective. *Williams* signs for “self and co-assignee, *Lawless*,” but one assignee cannot

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sign for himself and the other; *ex parte Morley, Buck*, 109.

[The CHIEF JUDGE: — This is not a petition by two assignees, and signed by one only. *Williams* petitions for himself and *Lawless*.]

Then another irregularity starts up: if *Lawless* be not a petitioner, he ought to have been served as a respondent. (a)

4th, The title of the affidavits is defective; they are entitled “in the matter of *James Kenton*.” This would not sustain a prosecution for perjury, as there are two proceedings against *Kenton*,—a commission and a fiat.

5th, The petition prays to supersede the fiat, but the petitioning creditor is not served; he is not only entitled to be heard to maintain the validity of the fiat, but it is his duty so to do. If the fiat be upset for want of form, the assignees would be entitled to be indemnified by him.

The COURT having suggested, that the only consequence of insisting on the 3d and 4th objections would be, that the petition would stand over to be amended, and that the 5th was only important if the Court were inclined to supersede, which at present it was not, these objections were waived.

Mr. *Montagu* and Mr. *Wright*: —

1st, Multifariousness only exists when distinct persons pray distinct relief. *Ex parte Coles, Buck*, 256; *ex parte Bousfield, Mont.* 128. In this petition there is a common object, viz. to divide the funds among the creditors

(a) *Ex parte Harris*, 2 Dea. & Ch. 4.

of the commission of 1826, and the prayer for superseding the fiat is only one means of accomplishing that end.

2d, That proper parties are not before the Court.

To prevent any objection as to *Shiers*, two creditors join in this petition, and they alone might sustain the petition, putting *Shiers* out of the question; but in fact the partner of *Shiers* is dead.

Mr. *Swanston*, in reply, was stopped by the Court.

The CHIEF JUDGE:—

If pressed, I must say that I think this petition multifarious; it prays to supersede the fiat, and that the property got in under the fiat may be delivered up to the assignees under the commission, and it prays that the dividends under the fiat may be stayed; these three prayers are consistent, and have one common object, all being auxiliary to the proposed end of superseding the fiat, and therefore so far the petition is not multifarious.

But the petition also prays to remove *Shiers*, an assignee under the commission of 1826, who has since become bankrupt; this is unnecessary; it might be done under the general order (a); and then the petition asks a new choice of assignees under the commission. But that is a matter quite collateral to the main prayer as to the supersedeas, and with which the parties under the fiat have nothing to do, it not being a necessary or essential step in the proposed supersedeas. Still it would be too strong to dismiss a petition on this ground; it may stand over to be amended.

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What is multifarious.

(a) *Ex parte Green*, 1 Dea. & 78; *ex parte Moore*, 2 Dea. & Ch. 382; *ex parte Moore*, 2 Dea. Ch. 369.
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Sir *John Cross* : —

Several objections were started, which are now reduced to two.

1. Want of proper parties.
2. Multifariousness.

1. It appears to me that the petitioners are not proper parties. Their debts are eleven years old, and they have never attempted to prove. If they had proved, they might procure the commissioner to order a new choice, and then there would be assignees, who are the proper persons to petition in this case. I am of opinion that the petitioners ought to have gone before the commissioners instead of coming here.

Then as to *Williams* and *Lawless*, they are the assignees of *Shiers* ; but as such they are only entitled to one moiety of the debt, and cannot alone petition.

I am therefore of opinion that the petition cannot be proceeded with for want of proper parties, consequently it becomes unnecessary to say any thing as to the objection of multifariousness.

The CHIEF JUDGE : — I cannot bring myself to concur in thinking that the petitioners *Williams* and *Lawless* are not entitled to support the petition as to the superseedeas, for any creditor has a right to supersede though he have not proved.

Sir *George Rose* : — The petition must stand over to be amended.

Mr. *Swanston* submitted that the petition must be dismissed. Multifariousness is always fatal to the pleading which it vitiates. How can the petition be amended ? Not by expunging the multifarious portions, for then the record would go on a matter previously expunged. The expunging should have been by a separate order.

The CHIEF JUDGE:—

If the want of parties were a good objection the petition must be dismissed; but I am not convinced that such is the case, two of the petitioners being creditors, who have a right to petition to supersede.

And as to the multifariousness, that portion of it which asks to remove *Shiers*, and for a new choice, is no doubt quite unnecessary and irrelevant; and therefore the petitioners must, in any event, bear the costs the respondents may have been put to in relation to that portion of the petition; but I do not think it sufficient to cause the dismissal of the petition; and as counsel are now prepared, I confess I should regret that it should stand over. The better course will be to let it stand as amended, and proceed to discuss the main point as to supersedeas.

Sir *John Cross*:—The two creditors have slept during eleven years. Their only right is as creditors. It may be they are not in fact creditors. Why do they not show they are by going in and proving? They then would have assignees appointed who would represent the body of creditors. I am of opinion that it is not advisable for the Court to act on their request. Their debt, if it ever existed, may have been barred by the statute of limitations; for the commission of 1826 may after all turn out invalid. All ever done under it was to proceed to adjudication, only one debt was proved, and no assignment made. In short, it has been treated as defunct.

The parties having acquiesced in the suggestion of the Chief Judge, that the petition should stand as amended, the petition was now heard on the merits.

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Mr. *Montagu* and Mr. *Wright* for the petition : —

It is assumed, 1st, That a second commission against an uncertificated bankrupt is void at law. *Till v. Wilson*, 7 *Barn. & Cres.* 684; *Fowler v. Coster*, 10 *Barn. & Cres.* 433; *Nelson v. Cherrill*, 7 *Bing.* 663; *Phillips v. Hopwood*, 1 *Barn. & Adol.* 621; *Bayley v. Michells.* (a) The principle of the rule has lately been recognized by the legislature in 6 *Geo. 4.* c. 16, s. 127, which enacts, "that if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment; but his future estate and effects (except his tools, the wearing apparel of himself, his wife, and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like

(a) *Bayley and others v. Michells*, K. B., Michaelmas Term, 1832.

The plaintiffs (the assignees) having been nonsuited, principally on the authority of *Nelson v. Cherrill*, 7 *Bing.* 663, this was a motion for a new trial.

Mr. *F. Pollock* and Mr. *Bliss* for the plaintiffs.

Sir *J. Scarlett* and Mr. *Follett* for the defendants.

The Court took time to consider, and finally ordered the rule

for setting aside the nonsuit, and for a new trial to be made absolute, saying, that, in a question of so much importance, they wished the facts to be stated on the record.

This amounts of itself to very little; nevertheless if the Court of King's Bench had not doubted the soundness of the doctrine of the utter nullity of the subsequent commission, they would not have set aside the nonsuit, and have ordered the new trial

manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." It may be admitted that doubt exists as to the soundness of the principle of the law of this section. (a) By the old law, if a creditor could issue execution against the goods of an uncertificated bankrupt, he was entitled to retain them, and the vigilant creditor protected himself; but this is now abrogated, and the assignees may seize the property. Such being the law, the question is, whether the Court will interfere to carry that law into execution.

The course constantly pursued is to supersede the second commission on the petition of the assignees under the first, *ex parte Bullen*, 2 *Rose*, 136; *ex parte Bold*, *Cook*, 10; *ex parte Degraives* and *ex parte Lees*, MS., cited *Mont. & Gregg*, Dig. 399, or of the creditors under the first; *ex parte Proudfoot*, 1 *Atk.* 252; *ex parte Poulden*, 16 *Ves.* 474;—but not in general on the petition of the bankrupt; *ex parte Crew*, 16 *Ves.* 236; *ex parte Lees*, 16 *Ves.* 474; *ex parte Cridland*, 2 *Rose*, 167.—The rule, then, is to supersede, but there are cases of exception. The question therefore is, what are the causes of exception? And they are two.

1st, Fraud.

2d, Contract.

In both of which cases the Court has said, that the

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(a) Soon after the act passed, Mr. *Montagu* published the three following queries:—

"Q.1. Is not this clause founded on a total mistake of the principle of the bankrupt laws, and the wise and cautious provision by Lord *Hardwicke* in the statute of *George*?

"Q.2. Will not this clause

operate as a licence to uncertificated bankrupts to obtain property from innocent vendors, and deprive them of the power of obtaining payment either by action or by issuing a third commission?

"Q.3. Has not this clause operated most oppressively, and does it not continue so to act?"

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subsequent creditors shall not be prejudiced by the misconduct or acts of the old creditors.

1st, If four years after the first commission a second issue, under which the bankrupt obtain his certificate with the knowledge of the assignees under the first, and a petition be presented by the assignees under the first, which on a compromise be withdrawn, the Chancellor will not supersede the second, on the petition of two of the creditors under the first, presented by them three years after the certificate has been allowed. *Ex parte Proudfoot*, 1 *Atk.* 252.

2d, The Court will not supersede when the creditors under the first commission have, by contract, permitted the bankrupt to trade. *Ex parte Bourne*, 2 *Gl. & J.* 141; *ex parte Bullen*, 1 *Rose*, 136, where Lord *Eldon* says, "A second commission, while a first is subsisting, is, strictly speaking, void; but such commission can only be set up against a subsequent one when it is in legal operation. If the parties under the first have, by contract, placed themselves in a different situation, I will not suffer them to defeat the fair claim of creditors under another. In *ex parte Lees*, 16 *Ves.* 472, a commission was kept on foot for fifteen years, to protect the bankrupt, and enable him to defraud the creditors and assignees under a second commission, and a petition by the petitioning creditor under the first to supersede the second was dismissed with costs, Lord *Eldon* saying, "It has been said correctly, that though the second commission is void at law, the Court does not therefore supersede the commission; that it has frequently refused, admitting the commission to be void at law, the party standing in circumstances under which he could not be heard for that purpose, as in many cases it might be fit to leave those who claimed under the commission to attempt to maintain it at law; and if the first com-

mission had been kept on foot fifteen years with the view of protecting the bankrupt, and enabling him to defraud all those with whom he might deal in subsequent transactions, I should rather supersede the first commission at the instance of the assignees under the second, than the second at the instance of the assignees under the first."

There have been cases where it has been supposed that the creditors under the second commission might, in consequence of laches not amounting to agreement, be entitled to a preference over the creditors under the first: but, on the other hand, where there has not been any fraud on the part of the creditors under the first commission, or any agreement amounting to a waiver, the Court will supersede the second.

The law was correctly stated in argument by counsel, in *ex parte Lees* and *ex parte Poulden*, 16 Ves. 472. "A second commission of bankruptcy pending the former commission could not possibly be maintained at law. Upon proof of the first commission, and assignees existing under it, the assignees under the second must be nonsuited. Yet though the subsequent commission be void at law, a case may be made upon which your Lordship would refuse to interfere; and the question is, whether these facts raise that case? In *ex parte Proudfoot*, 1 Atk. 252 (a), the circumstances amount to direct evidence of assent by the creditors under the first commission; a clear waiver of their right, which without doubt they may waive. This is not the case of a mere application by the bankrupt himself. The principle is, that an uncertificated bankrupt has against all the world, except his assignees under the first commission, a special property, enabling him to give a competent title. In that respect *ex parte Rhodes*, 15 Ves. 539, *ex parte Mar-*

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(a) See *ex parte Crew*, 16 Ves. 236.

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tin, 15 *Ves.* 114, *ex parte Brown*, 2 *Ves.* jun. 67, and other cases of that class, have no application; and upon *ex parte Bold, Cook*, B. L. 9, it is not enough that a subsequent trade was carried on, of which the first assignees could not be ignorant, that simple fact not amounting to a waiver of their right. The circumstances of this case afford some suspicion, but no evidence of an agreement that will amount to a waiver. During the last seven years the bankrupt did not reside near the petitioning creditor or the assignees under the first commission, and in that period all the subsequent debts accrued."

But these cases, with respect to the interposition of the Court to set up a second commission against a first, have always been regarded with great doubt, and the Court has declined to interfere, except on bill; *Troughton v. Getley*, Amb. 632; *ex parte Bold, Cooke*, 10; *ex parte Stubbs*, 3 *Ves.* & B. 107; *ex parte Degraives*, MS. *Mont.* & *Gregg*, Dig. 399; *ex parte Lees*, *ibid.* And in the late case of *ex parte Welch*, *Mont.* 276, the right of the assignees under the first commission is recognized, and the course of the Court has been, on superseding the second commission, to permit the assignees to retain their costs attendant on the commission out of the property of which they have possessed themselves. *Ex parte Degraives*, MS. cited *Mont.* & *Gregg*. Dig. 399; *ex parte Lees*, MS. *ibid.*

The hardship on the creditors under the second commission is no reason to induce the Court to deprive those under the first of their legal rights; to allow such influences to operate would not be interpreting but making law.

Ex parte Welch,
Mont. 276, corrected.

Sir George Rose :—In the report of *ex parte Welch* (a) some facts have been omitted which it is of consequence

should be supplied. That case was an appeal from the decision of the Vice-Chancellor, which was reversed. The statement of the case, as reported, is, that 1822 *Merryweather* compounded with his creditors; that in 1826 a commission issued against him, under which the petitioners were assignees, and under which fifteen shillings in the pound had not been paid; and that in 1830 another commission issued, which the petitioners prayed might be superseded. No doubt, under that state of facts, the second commission would have been void, and there would have been no reason to refuse the supersedeas and reverse the judgment of the Vice-Chancellor. But the fact of the existence of the composition was denied by the respondents; the petition stood over for the petitioners to produce an affidavit of the fact, and when it came on again they failed in establishing that fact, and the petition thereupon broke down, and the Lord Chancellor's decision went on that fact, and on that alone.

At the end of the case the reporter adds, "In consequence of this apparent conflict of opinion, I subjoin a note upon the question, whether a commission against an uncertificated bankrupt is void at law." By this I think the object of the conflict was mistaken. The King's Bench, in *Till v. Wilson*, 7 Barn. & Cres. 684, said, "We consider that, by the authorities referred to, it is fully settled that the Lord Chancellor has no power under the bankrupt statutes to issue a commission for the purpose of distributing effects which are already vested in assignees under a prior commission, and that such commission is not merely nugatory, but void."

To this the Lord Chancellor said, in *ex parte Welsh*, "I cannot adopt the opinion (I say it with great respect to the learned Judges)—I cannot adopt their *obiter dicta* in those cases. I cannot bring my mind to say

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that the Great Seal has not the power to issue a third commission in these cases, when I do not find the power is limited or taken away by the act of parliament."

The conflict was, not as to the validity of subsequent commissions, but as to the power to issue them. The King's Bench appeared to think the Great Seal had no such power, the Lord Chancellor was of opinion it had: that was the whole conflict.

Mr. *Swanston* and Mr. *Bethell*, for the respondents, were stopped by the Court.

The CHIEF JUDGE:—

There can be no doubt of the existence of the general rule, that a second commission or fiat against an uncertificated bankrupt is void at law; but the question is, whether this Court ought, in its discretion, to interfere to supersede? It has been argued, that the general rule in bankruptcy is to supersede the second commission, unless there be fraud, consent, or contract on the part of the assignees and creditors under the second; and many cases have been cited to prove this. The only cases, however, in which it was actually done, are *ex parte Bold*, *Cooke*, B. L. 10, and *ex parte Lane*, *Mont.* 12.

In *ex parte Bold*, the length of time, added to other circumstances, induced the counsel to admit they could not support the commission, and therefore the Lord Chancellor superseded.

In *ex parte Lane*, the dicta of the King's Bench, that the Lord Chancellor had no power or right to issue subsequent commissions, were adverted to, and the Vice-Chancellor appears to have proceeded entirely on the strength of these dicta, his Honor saying, "I have no alternative; as the commission is void at law, how can I

permit it to stand?" The doctrine, however, that the Great Seal had no power to issue the subsequent commissions has been over-ruled.

Many cases, however, have been cited in which the Chancellor refused to supersede. Among them *ex parte Lees*, 16 Ves. 472, appears to lay down the rule most clearly. In that case Lord *Eldon* said, "It has been said correctly, that though the second commission is void at law, the Court does not therefore supersede the commission; that has been frequently refused, admitting the commission to be void at law, the party standing in circumstances under which he could not be heard for that purpose. As in many cases it might be fit to leave those who claimed under the commission to attempt to maintain it at law, and if the first commission had been kept on foot fifteen years, with the view of protecting the bankrupt, and enabling him to defraud all those with whom he might deal in subsequent transactions, I should rather supersede the first commission, at the instance of the assignees under the second, than the second at the instance of the assignees under the first."

The circumstances of the case now before the Court are as follow:—In 1823 a commission issued, under which only one creditor, *Shiers*, proved for 150*l.*, and chose himself assignee. In the same year the examination of the bankrupt was adjourned *sine die*, and no steps have since been taken under the commission. In 1826 *Shiers* went to America, having become bankrupt. In 1830 a fiat issued against the bankrupt (*Kenton*), and in 1834 a petition is presented to this Court by two persons—claiming to be creditors who might have proved under the commission,—and one of the assignees of *Shiers*; and the question which arises in these facts is, will the Court supersede the commission of 1826? If the interference of the Court were necessary to enable

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the parties to try their legal rights, the Court would probably act ; but the petitioner may proceed at law ; or may have fresh assignees appointed, &c. independently of this Court.

It is unnecessary to supersede : it is also unnecessary to restrain the distribution of the dividends. If the assignees under the fiat deal improperly with the property of an uncertificated bankrupt, they are liable at law to the assignees under the prior commission.

I am therefore of opinion that the petitioners have not established a case for the interference of the Court.

It consequently becomes unnecessary to consider the effect of the absence of the petitioning creditor under the fiat ; for although Mr. *Swanston* waived that point, so far as he was concerned, yet that would not enable the Court to hear the petition in his absence, if there were any chance of its being called on to supersede.

This petition must be dismissed.

Sir *John Cross* : — I am not able to find that any rule either of law or equity is in dispute. The general rule is admitted. It is also admitted that it is in the discretion of the Court whether or not, under all the circumstances, it will supersede. All the cases prove that such discretion exists, and prove that it has been exercised. The petitioners have no ground, either in reason or equity, to take this property from the assignees under the fiat ; their rights are founded on strict, dry, legal grounds ; consequently they must establish a strict, dry, legal title. Have they done so ? The absence of the petitioning creditor is a fatal objection. I concur that this petition must be dismissed.

Sir *George Rose* : —

Nothing can be better defined or more intelligible than the general rule. I concur in opinion with my

learned colleagues, and the reasons given by them should be distinctly understood as furnishing the grounds on which the Court will act in such cases.

That we shall always supersede, even a third commission, as a matter of course, is a proposition not to be entertained; in saying which, I am sanctioned by the high authority of the Lord Chancellor, after his attention was called to that point. The Great Seal always dealt at pleasure with the commission, either superseding, or leaving the parties to their remedies at law, considering it as a mere question of title. The term "void" has been used as applicable to a second commission, circumstanced as the present is; but that is not quite correct. The commission is not "void," it is the assignment which is "void." In an action of trover the assignment is the title in the first instance, and till the defendant throws the assignees back on the commission to support it as the grounds of their title. If there be five hundred commissions the title is good under any one of them which could be legally established in evidence.

The assignment is the title till overset by a better assignment.

In this case two opposing principles require to be applied.

1st, The second commission is void.

2d, The legal title must give way to the equitable title.

The first commission gives the legal title, and *prima facie* the principle that *equitas sequitur legem* would apply, and the second commission would be superseded.

But the right to supersedeas may be qualified by circumstances. It has been argued that it is a general rule in equity to supersede the second commission;

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If the existence
 of two commis-
 sions creates
 inconvenience,
 one of them,
 probably the
 first, will be
 superseded.

I do not admit that any such rule exists. The reason of the very general practice of superseding one of the commissions is, because the existence of two generally creates inconvenience. When that occurs the first is superseded, to enable the estate to be administered with convenience under the second.

It may be laid down as a general rule, that if the existence of two commissions create an inconvenience, then one of them, and probably the first, will be superseded. The embarrassment and inconvenience to which I allude arises from the bankrupt being at one time under examination under two fiats, from books being carried backwards and forwards, and from debts being claimed and disputed twice over, &c.

If, indeed, there had been any difficulty in proving the title at law under the first commission in the present case, and the assignees under the fiat had not petitioned to supersede the commission, then this Court might probably have been induced to supersede the fiat.

The objection of want of proper parties to this petition is in my opinion conclusive. The petitioners are not creditors who have come in under the commission. It is true that a petition to supersede may be presented by persons not creditors under the commission or fiat, but in this particular case, unless they petition to supersede the fiat as creditors under the commission, they have no possible right to be heard. Again, if they do not claim as creditors under the commission, their debt is barred by the statute of limitations, and they are not creditors at all.

In this case the assignee under the commission paid his own debt in full, thereby consuming all the assets, and consequently there was an end of all care for the commission, all the property being distributed, and there-

fore no creditor paid any attention to it, and it was considered, down to the present moment, as mere waste paper; and the creditors gave no thought as to where the bankrupt went, or what he did. He left his residence, and removed one hundred miles off, to Poplar, near London, and sat up in trade, and a fiat issued against him.

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Under these circumstances, even if there were regular assignees under the commission, who proceeded at law to recover the property from the assignees under the fiat, I do not much doubt but that this Court would issue an injunction to restrain them.

It therefore appears to me that this petition to supersede the fiat cannot be sustained. Even assuming that the petitioners were proper parties to petition, what would be the result if the fiat were superseded? The petitioners would be paid in full, while the creditors under the fiat would not receive one farthing.

Petition dismissed. (a)

Ex parte LOMAS. — In the matter of LOMAS.

THIS was a petition by the bankrupt for his allowance. (b)

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If the assignees distribute a sum without an order of dividend, and the bankrupt subsequently obtain his certificate, he is entitled to his allowance as if they still had that sum in their hands.

(a) The partner had too little shillings in the pound, shall be interest to appeal. allowed five per cent. out of such

(b) "Every bankrupt who shall produce, to be paid by the assignees, provided such allowance shall not exceed four hundred pounds; and every such bankrupt, if such produce shall pay

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In February 1831 the commission issued, in February 1832 a dividend of 10*s.* in the pound was declared, and in March 1832 a dividend of 4*s.* 6*d.* In November 1833 the petitioner obtained his certificate.

Subsequently to the second dividend, but before the bankrupt obtained his certificate, the assignees having a sum of 215*l.* in their hands distributed it rateably among the creditors, of their own authority, and without any order for a dividend.

On the 25th of March 1833 a meeting was held to audit the accounts of the assignees, when Mr. Commissioner *Fane*, refusing to take any notice of the unauthorized distribution of the 215*l.*, found that the assignees had a balance of 215*l.* in their hands, and appointed the 25th of April for a further and final dividend.

This final dividend meeting, however, the assignees never advertised, as they had, in fact, already distributed the 215*l.* in the manner above mentioned.

Mr. *Ching* and Mr. *Hetherington*, for the petition.

Mr. *Swanston* for the assignees : — The bankrupt had no claim to allowance till he obtained his certificate ; he demands to be paid out of the 215*l.*, but that sum was distributed before he obtained his certificate ; it is true

such creditors twelve shillings and sixpence in the pound, shall be allowed and paid as aforesaid seven pounds ten shillings per cent., provided such allowance shall not exceed five hundred pounds ; and every such bankrupt, if such produce shall pay such creditors fifteen shillings in the pound or upwards, shall be allowed and paid as aforesaid ten pounds per cent., provided

such allowance shall not exceed six hundred pounds ; but if such produce shall not pay such creditors ten shillings in the pound, such bankrupt shall only be allowed and paid so much as the assignees and commissioners shall think fit, not exceeding three pounds per cent., and three hundred pounds." — 6 Geo. 4, c. 16, s. 128.

the assignees ought not, in strictness, to have divided the 215*l.* without an order of dividend, but it is against all principle to allow a party to found a complaint on an error of form who had no right to complain when the error was committed.

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Per Curiam : —

The commissioner finds that the assignees have 215*l.* in their hands; they reply they have distributed the sum; but it is clear the act never contemplated such a method of distribution; a regular order of dividend made by the commissioner was necessary. The assignees have distributed the money in their own wrong. It is proper assignees should know, if they really act under the delusion which this defence implies, that they are personally liable for the consequences, especially to out-laying creditors.

To allow assignees to act as these have done would lead to infinite mischief; for instance, the creditors would not sign the certificate till the assignees had paid away all the funds.

The reason a bankrupt cannot have an allowance till after a final dividend is, because till then fresh creditors may come in and prove: which might vary his rate of allowance.

The following order was made:

That it appearing by the proceedings that a final dividend had taken place, and the assignees admitting they had applied the balance in their hands, amounting to 215*l.*, in payment to the creditors, and that they had not any further assets, the Court order that it be referred to the commissioner to ascertain the allowance of the petitioner, the commissioner taking into calculation the sum of 215*l.* paid as aforesaid. And that the assignees

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should pay to the petitioner such allowance, not exceeding the extent of the said sum of 215*l*. And it was further ordered, that the said assignees should pay to the petitioner, or to his solicitor, the costs of and occasioned by the said application.

C. of R.

April 29
& 30,
1834.

Payments improperly made, as the consideration for signing a composition-deed, may be deducted, or set off, from a proof made under a subsequent fiat for a subsequent debt.

Ex parte MINTON. — In the matter of GREEN.

THIS was a petition to prove.

In March 1830 *Rhoda Green* compounded with her creditors, paying 13*s*. 6*d*. in the pound; *Minton* was a creditor for 269*l*., and received three bills of exchange for 60*l*. as his proportion.

After he had executed the composition-deed *Rhoda Green* paid him, on the 31st of March, 21*l*., in October 30*l*., and in August 1831, 36*l*.

In November 1832 a fiat issued against *Rhoda Green*; she then was indebted to *Minton* 160*l*., for goods sold to her since her former failure: *Minton* applied to prove, but the commissioners allowed a proof for 72*l*. only, on the ground that *Minton* had already received 87*l*. (*i. e.* 21*l*., 30*l*., and 36*l*.) which ought to be deducted from the 160*l*.

This was a petition by *Minton* to prove for 160*l*., stating, that after he had executed the deed of composition, *Rhoda Green*, on the 29th of March, expressed her regret that he had been a loser, hoped he would not withdraw his confidence, but would still send goods to her, and that if ever in her power she intended to pay him his debt in full; and that the payments in question were voluntarily made.

Mrs. *Green* deposed, that she agreed to pay the debt

in full to induce *Minton* to sign the composition-deed, which he otherwise refused to do.

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In the matter
of
GREEN.

Mr. *Montagu*, for the petition, urged that this was not a case of set-off; if any right existed, it was the subject of an action.

Mr. *Swanston*, for the assignees:— The payment was in pursuance of an anterior agreement, and void: *Jackson v. Lomas*, 4 T. R. 166; *Wells v. Girling*, 1 Brod. & Bing. 447. (a)

Mr. *Montagu*, in reply, said:— If the case of the respondents be grounded on fact, both parties are to blame; in which case, *potior est conditio possidentis*; and cited *Rutter v. Rhodes*, 1 Esp. 236; and *Bradley v. Gregory*, 2 Camb. 383.

Per Curiam:— There being a conflict between the affidavits, whether the agreement to pay *Minton* in full were before or after the signing the deed, the Court will carefully look through the affidavits to endeavour to ascertain how the fact is.

Curia advisare vult.

The CHIEF JUDGE:—

April 30.

The Court are unanimous in opinion that this petition must be dismissed. This is in accordance with the general principle of law, founded in public policy, that, on these occasions, one creditor is not allowed to obtain any secret advantage over another; and follows *Smith v. Cuff*, 6 Mau. & Sel. 161, which is closely similar to the

(a) See many other cases to the same point, 1 *Mont. & Gregg, Digest*, 206.

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present case: it was there, as here, argued that the parties were in *pari delicto*, but Lord Ellenborough said, "This is not a case of *pari delictum*; it is oppression on one side, and submission on the other; it can never be considered as *pari delictum* when one holds the rod and the other bows to it." Such being the law, the case resolves itself into one of fact, whether there were any prior agreement that *Minton* should receive more than the other creditors? Having looked through the affidavits, I am satisfied there was some such agreement: the creditors who signed after *Minton* were influenced by his signature, and signed under a fraud.

The probability of the case is strongly against the account of *Minton*, it being unlikely that a woman just emerged from difficulties should bind herself as alleged.

Petition dismissed with costs.

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April 30,
1834.

A docket was struck on a note on which the bankrupt and *Ward* were jointly liable: afterwards a tender was made on behalf of *Ward*: a petition to supersede for want of a petitioning creditor's debt, dismissed. Payment, after docket struck, would have been invalid.

Ex parte JONES. — In the matter of LAMPLOUGH.

THIS was a petition by the trustee under a trust deed executed by the bankrupt, praying to supersede for want of a good petitioning creditor's debt. That part of the debt on which question arose was a note for 100*l.*, for which the bankrupt was jointly liable with *Ward*.

The docket was struck on the 21st of December, and the fiat issued on the 23d of December 1833.

The objection to the debt was, that *Ward* had tendered payment of the note before the fiat issued.

The petitioning creditor deposed, that no tender was made till the morning of the 23d of December, when he

did not feel at liberty to accept it, as instructions to strike a docket had already been forwarded to London.

In 1833 the bankrupt assigned all his personal estate to the petitioner on the usual trusts for payment of his debts.

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Mr. Bethell and Mr. Arnold, for the assignees, objected that the petitioner claimed under the trust-deed, and not under the fiat; and consequently had no *locus standi* to petition to supersede the fiat.

The CHIEF JUDGE:—Whenever a party can prove that any grievance will arise to him through the fiat, he may petition to supersede it; the Court once superseded on the petition of a person summoned to attend as a witness before the commissioners. (a)

'Sir George Rose:—

Any creditor, though claiming adversely to the fiat, may petition to supersede. A judgment creditor may so petition. A bare trustee under a deed, who is not a creditor, may apply to supersede on the ground that the fiat is an obstacle to the execution of his trust, and so far a grievance. In this case, however, the trustee will be much aggrieved if the fiat stand; because, if so, the trust-deed is invalid, and he may have to pay expenses.

But we must require this trustee to enter into some terms of bringing the property into Court, and undertaking to be bound by the order, if against him.

(a) *Ex parte Lane*, Mont. 12.

An attorney having neglected him: held the plaintiff in the to put in bail according to an undertaking, an attachment issued; support a petition to supersede. a commission then issued against *Ex parte Bold*, 1 Cox, 423.

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Mr. *Swanston* and Mr. *Ching* : —

The petitioner agrees to the terms.

Es parte
JONES.In the matter
of
LAMPLOUGH.

A tender was made of the 100*l.* before the fiat was issued. The ground of a fiat is, that the bankrupt has “defeated or delayed” his creditor, which is impossible to allege when the debt was actually tendered.

Even though the tender had not been legally formal, yet it was against all equity and good faith subsequently to issue a fiat.

Mr. *Bethell* and Mr. *Arnold*, *contra*, were stopped by the Court.

The CHIEF JUDGE : —

This fiat is not disputed because issued for any purpose not sanctioned by law, or because not beneficial to the creditors ; but on the ground of there being no petitioning creditor’s debt.

In fact, this is a mere struggle between the trustees and the assignees. A tender does not extinguish a debt, it merely is a bar to an action ; so that if a subsequent demand be made and payment refused, an action will lie. But here the tender was on behalf of *Ward*, and a tender by *Ward* would not be pleadable by the bankrupt in an action against him.

Sir *John Cross* : —

Even if the tender had been on behalf of the bankrupt, how would the facts stand ?

The affidavits for the docket were made and sent off to London before the tender, and the petitioning creditor might feel that, after making the affidavit of debt, he dare not accept the money.

If the docket were struck, it would be an invalid pay-

ment. A tender after action commenced is too late ; by analogy, a tender after docket struck is too late. (a)

Sir *George Rose* : —

If the money were paid after docket struck, it would be an invalid payment. (b)

Petition dismissed.

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JONES.

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of
LAMPLOUGH.

Ex parte BEAGUE. — In the matter of
SCONSWAR.

C. of R.
May 5,
1834.

THERE were three partners. In February 1833 a joint fiat issued against two of the partners ; a docket had just been struck for a separate commission against the third. This was a petition praying that the separate fiat might be directed to the same commissioners as those to whom the joint fiat had been directed.

A joint fiat issued against two partners ; then commissioners were appointed in pursuance of 1 & 2 W. 4, c. 56, s. 14 ; a separate fiat against the third partner cannot be directed to the old commissioners.

Mr. *Swanston* : —

The petitioning creditor (who is a joint creditor of the three) is desirous of the direction of the Court. The 6 Geo. 4, c. 16, s. 17, enacts that if, after a commission issued against two or more members of a firm, any other commission or commissions shall be issued against any

(a) A tender, to be valid, must be made before the issuing of the writ, *Bac. Abr. Tender (D.)* for that constitutes the actual commencement of the suit ; but steps taken by a plaintiff in contemplation only of an action, such as retaining an attorney and instructing him to sue out a latitat against a defendant, or even an application

by the attorney at the office for a writ, will not deprive the defendant of the benefit of his tender, if it were made before the actual commencement of the suit. *Briggs v. Calverley*, 8 T. R. 629.

(b) See *ex parte Thompson*, 1 Ves. jun. 157 ; *ex parte Gedge*, 3 Ves. 349 ; *ex parte Browne*, 15 Ves. 472.

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other member or members of such firm, such other commission or commissions shall be directed to the commissioners to whom the first commission was directed, and immediately after the adjudication under such other commission or commissions, the commissioners shall convey and assign all the estate, real and personal, of such bankrupt or bankrupts, to the assignees chosen in the first commission; and after such conveyance, all separate proceedings under such other commission or commissions shall be stayed; and such commission or commissions shall, without affecting the validity of the first commission, be and form part of the same; provided that the Lord Chancellor may direct that such other commission or commissions be issued to any other commissioners, or that such other commission or commissions shall proceed either separately or in conjunction with the first commission. But the 1 and 2 W. 4, c. 56, s. 14, enacts that the judges who go the several circuits in England and Wales, may be directed by the Lord Chancellor from time to time to return to him the names of such number as he shall think fit to require, of barristers, solicitors, and attorneys practising in the counties to the said circuits belonging; and upon such persons being returned and approved by the Lord Chancellor, the fiat or fiats aforesaid not directed to the Court of Bankruptcy shall be directed to some one or more of such persons in rotation to act as commissioners of bankrupt, according to the district or places for which such persons shall be so returned, *and to no other person than such as shall be included in such return*: provided always, that it shall be lawful for the Lord Chancellor at any time to remove any person from the lists to be so returned, for such cause as shall to him seem fit.

This latter section creates a difficulty; new commissioners have been appointed under that clause, and

the former fiat is directed to commissioners who are not in the new list; therefore, unless the Court can interfere, the new fiat will be directed to the new list.

The present application is, that the new fiat may be directed to the old commissioners.

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Ex parte
BRAGUR.
In the matter
of
SCONSWAR.

Per Curiam :— The words of the act are imperative, and the Court has no power to interfere; if the order asked were made, the second fiat would be liable to be upset at law.

Ex parte WILLIAM BARRETT.—In the matter of
CHARLES BARRATT.

C. of R.
May 7,
1834.

ON the petition of *W. Barrett*, a reference was ordered to one of the deputy registrars of the court to tax the bills of costs of *George Cooke*, and that he should account for all sums received on account.

When several bills are taxed, the one-sixth is calculated on the aggregate amount.

The deputy registrar made a certificate in July 1833, which was objected to, and ordered to be reviewed; and in February 1834 he certified that he had taxed four bills of costs, as follow :

	£		£
A bill of	195	taxed at	164
—	78	—	60
—	14	—	5
—	26	—	8

And he certified that *Cooke* had been overpaid 8*l*.

The amount taxed off the bill of 195*l*. was less than one sixth, but the aggregate taxed off the whole four bills exceeded one sixth.

This was a petition praying that *Cooke* might be ordered to pay over the 8*l*., and that he might pay the costs of taxation.

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Ex parte
 BARRETT.
 In the matter
 of
 BARRATT.

Mr. *Swanston* for the petitioner, who was both petitioning creditor and assignee.

Mr. *Koe* for the respondent: — One sixth is taxed off the aggregate amount of the four bills; but they ought to be taken separately, in which case, as one sixth was not taxed off the 195*l.* bill, the respondent ought not to pay the costs of its taxation. The bills were for distinct matters: the 195*l.* bill was for business done under the bankruptcy for the petitioner, first in his character of petitioning creditor, and second in his character of assignee; the 78*l.* bill was for conveyancing business transacted for the petitioner as a mortgagee under the bankruptcy; and the 14*l.* bill was for the costs of an action, quite independent of all the other transactions.

THE CHIEF JUDGE: —

The rule in the common law courts is, that if one sixth be taxed off, the solicitor is to pay the costs of taxation; if less, the costs are in the discretion of the Court. (a) 1 *Tidd*. Prac. K. B. 337, edit. 5. This rule is followed in equity, 1 *Turn. & Ven.* Ch. Prac. 864, and adopted in bankruptcy. (b)

This rule is not contested, but it is urged that the bills, being for separate matters, are to be taxed separately, and the costs to depend on the taxation of each.

(a) "And the said respective Courts are thereby authorized to award the costs of such taxation to be paid by the parties, according to the event of the taxation of the bill; that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the Court in their discretion shall charge the attorney or client in regard to the reasonableness or unreasonableness of such bill." 3 Geo. 2, c. 23, s. 23, made perpetual by 30 Geo. 2, c. 19, s. 75.

(b) *Ex parte Westall*, 3 *Ves. & Bea.* 141.

If one of these bills had been against *Barrett* as petitioning creditor, and another against *Barrett* and some other person as assignees, &c. it might create some such distinction.

In the present case it is immaterial that the matters are distinct. The sum taxed off must be calculated on the aggregate amount of all the bills.

Sir John Cross : — If the three bills had been proved to have been distinct I should have felt some doubt, but that is not established. I concur.

Sir George Rose : — This is a question of general practice, not in bankruptcy only, which on this point is adopted from that of Chancery and the other courts. If one sixth be taxed off, the costs are of course; if less than one sixth, then they are in the discretion of the Court. This rule was always followed by Lord *Eldon* in bankruptcy; and I feel convinced that there have been cases where the same rule has been followed when there were several bills. The present objection was never before taken, which is a strong circumstance, though not conclusive, against its validity. The order for taxation restrains an action. Suppose the bills distinct, did they not nevertheless furnish one entire ground of action which was restrained by the order? Only one account was ordered to be taken.

Costs of the original petition, of this taxation, and of and incidental to this petition, to be paid by the respondent.

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BARRETT.
In the matter
of
BARRETT.

C. of R.

May 7,

1834.

After the choice of assignees, the Court will not make any order as to the bankrupt's allowance for maintenance.

Ex parte HALL. — In the matter of HALL.

THE petition stated that a fiat issued on the 21st of June 1832 against the petitioner and others; that on the 28th of August 1832 the commissioners, under the direction and at the request and recommendation of the assignees, made the following order: "That *John Hall* the elder, *Joseph Hall*, and *Thomas Hall* shall receive the sum of 2*l.* per week, until they have passed their final examination." That the final examination of the petitioner had been postponed from time to time, and that on the 14th of February 1833 he attended to pass his final examination, and produced his balance sheets, but they were rejected by the commissioners, and the examination of the petitioner and the other bankrupts was adjourned *sine die*. That the ground of the rejection was, because the petitioner would not alter them so as to make them correspond with the balance sheet of *Joseph Hall*, which the petitioner could not conscientiously do, as he believed that his balance sheets were correct. That since the 4th of October 1832 the allowance had been withheld by the assignees. That he could not recommence in business for want of his certificate, which he otherwise could do with the assistance of his friends, and that he had been compelled to apply to the parish officers for relief.

This was a petition by *Thomas Hall* for the arrears of his allowance, and that the commissioners might be ordered to pass the last examination under the balance sheets already produced.

The reason given by the assignees for discontinuing the allowance was want of funds.

The petitioner had paid 16*s.* in the pound on his separate estate.

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Mr. *Montagu* for the petition: —

By 6 Geo. 4. c. 16. s. 114. it is enacted, “ That it shall be lawful for the commissioners, before the choice of assignees, and after such choice with the approbation of the commissioners testified in writing under their hands, from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and family.”

The order made by the commissioners for the allowance being on the proceedings, the assignees have no right to refuse to pay it regularly.

The examination is indeed adjourned *sine die*. But why? Because the bankrupt cannot alter his balance sheet, which is correct, to tally with one which is incorrect. This custom of adjourning an examination *sine die*, because the commissioner is dissatisfied, is highly improper, and never could have been contemplated by the legislature. If the bankrupt did not satisfy the commissioners, he should have been at once committed, and then the question, whether he were bound to act as required? could be brought before some court on habeas corpus.

The intent of an adjournment *sine die* was to prevent the bankrupt harassing the assignees by continued examinations, and not to be used as a means of punishing the bankrupt.

But it is quite a mistake to imagine that a commissioner should not pass the last examination, because he perceives the bankrupt has not given a true account of his property; that may be a reason for passing, as an

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Ex parte
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of
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indictment cannot be preferred till after the bankrupt has passed his last examination.

Mr. *Swanston, contra*, contended, the Court had no power over the assignees in respect of the allowance.

The CHIEF JUDGE: — If the act authorized the commissioners to make the allowance, and they did so, and the assignees refused to pay it, the Court might interfere; but the act only enables the commissioners to make the order till the choice of assignees, after which the assignees may make the order with the consent of the commissioners. It is clear that the commissioners could not alone make the order on which this bankrupt claims, and the Court cannot make any order on this petition.

Sir *John Cross*: — Putting the case most favourably for the bankrupt, granting that the assignees and commissioners agreed, in the regular way, that an allowance should be made, how then would the case stand? The bankrupt says, the commissioners ought to have passed his last examination. The moment he passed his allowance ended, and yet he demands the arrears because he has not passed; that is to say, he asks an annuity of 100*l.* a year for not passing.

Petition dismissed. Costs not asked.

In the matter of LAWRENCE.

C. of R.
May 8,
1834.

THE commission issued in 1830. In October 1833 the bankrupt passed his last examination.

A. B. by his will left *C. D.*, *E. F.*, and the bankrupt trustees of his will, and his (*A. B.*'s) wife and the bankrupt executors. *C. D.* and *E. F.* disclaimed the trust, and the bankrupt, as acting trustee and executor, received sums on account of the testator's estate.

By an order of the Vice-Chancellor, in May 1831, on the petition of the executrix, a reference was made to the commissioners to take an account of what was due by the bankrupt, and the executrix was to prove for the same. The commissioners found 9,450*l.* due to the testator's estate, and admitted the proof accordingly.

The executrix died in 1832, leaving the bankrupt and two others executors of her will; the two others renounced probate, and the bankrupt thus became her sole executor.

The debts above 20*l.* amounted altogether to 19,142*l.*, proved by thirty-seven creditors; the debts under and up to 20*l.* amounted to 190*l.*, proved by thirteen creditors.

Forty-two creditors had signed the certificate, whose debts amounted to 7,549*l.*, being more than three fifths in number and value of those proving for 20*l.* and upwards, excluding the executorship debt.

The bankrupt, as surviving executor, had signed his own certificate, but the commissioners refused to allow it to pass with his signature, and expressed a desire that he should obtain the opinion of the Court thereon.

Mr. *Swanston*, for the petition, said, if the bankrupt could not sign it was impossible for him to procure his

It seems that a sole executor who becomes bankrupt may sign his own certificate.

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certificate, as the debt would be included in the calculation of the requisite number and value, and cited *ex parte Shaw*, 1 *Gl. & J.* 1.

The CHIEF JUDGE:—I see nothing to prevent the bankrupt signing the certificate; the necessity for this is caused by the death of the executrix and *actus Dei nemini faciat injuriam*.

Sir John Cross:—In *Cooper's case*, *Cooke*, 462, a similar order to that now asked was made. (a)

(a) *Cooper's case*, *Green*, B. L. 260, and *Cooke*, 462, is as follows:—

Upon petition preferred by creditors to the late Lord Chancellor, Earl *Hardwicke*, praying for the removal of a sole assignee, and that his Lordship would not confirm the commissioners' certificate of the bankrupt's conformity, the case, upon the allegations suggested therein, appeared singularly remarkable; for they stated (*inter alia*) that the clerk to the commission was the petitioning creditor, and sued it out; and that the present assignee's father, being the principal creditor under the commission, had chosen himself sole assignee, and that he had since departed this life intestate, leaving his said son, the bankrupt (and now sole assignee under his own commission), his only heir at law, whereby the said intestate's said son became his sole personal representative, and thereby, as he insisted, the

principal creditor under his own commission, and as such he had signed the commissioners' certificate of his own conformity, and also chosen himself sole assignee under the commission taken out against himself, and alleges that he is not obliged to render any account, because he cannot do it to any body but himself.

Which petition, on the hearing, was dismissed by the Chancellor, because his Lordship declared that every rule, every maxim, and every principle of law, concurred in recognizing the claim in question. It is well known (said his Lordship) that, by the law of England, the act of God or of the law can do no man any injury or wrong; but in case I was not to dismiss this petition, the act of God, as well as of the law, would do the person against whom it is preferred an irreparable injury; for as the original creditor died intestate, leaving the bankrupt his only son, and consequently universal

Sir George Rose : —

In this case there is a difficulty arising from the bankrupt being a trustee under the will, as well as executor.

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of
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heir, if I was to be of opinion his representative had no legal right, the person of the present bankrupt could never be released, as no other creditor is qualified to sign for him the commissioners' certificate. Nor can any person be legally qualified for that purpose during the life of bankrupt. Besides, what a strange construction must I put on the right in question? for then I must declare that both the act of God and of the law, viz. the death of the intestate, and the administration granted, and legally granted, to the surviving son and heir, operate so far as to make the residue of the intestate's estates liable to the demands of the administrator's creditors, but that those acts do not discharge his person, whereby the very end and true spirit of the bankrupt laws would be absolutely defeated; for the payment of debts releases the person in all cases; but under the bankrupt laws the bankrupt's all, though ever so deficient towards payment, operates not only to the full discharge of his debts, but also to the absolute release of his person.

When the law casts (continued the Chancellor) different rights on one and the same individual,

they are to be considered as centering in several persons, and as distinct rights; the party therefore entitled to them may exercise them separately; as, for instance, a mortgagee has many remedies to recover his money: the Chancery cannot enjoin such a creditor from proceeding on his bond in ejectment and action of covenant, as also on a bill for a foreclosure on all these at one and the same time; and such injunction hath been refused here, because no court of justice, much less a court of equity, can deprive a subject of his birth-rights, to which he is entitled by the law of his country, one of which is a right to bring an action for recovery of every species of property, though each accrues from one and the same cause. And in answer to the objection that courts of justice, especially those of conscience, should prevent circuitry and multiplicity of actions, and more so vexatious suits (which those in question are contended must be considered), his Lordship observed, that discharging the debt would put a stop to all the proceedings at once. But to mention a case rather more in point, the same person may prove a debt under a commission in his own right,

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A trustee cannot sign without a breach of trust. *Powel v. Evans*, 5 Ves. 839. I cannot approve of that decision, but such is the law as there decided. If the bankrupt, by signing as trustee, commit a breach of trust, that may be dealt with in another court.

The bankrupt is executor, and there is nothing to prevent his proving, and having proved there is nothing to prevent his signing his certificate, only that the Court may refuse to allow the certificate, unless the bankrupt had leave to sign.

On the whole, as the bankrupt is not restrained by positive enactment, I am of opinion that, in this case, the legal right to sign the certificate follows the right to prove.

Per Curiam : — We think the commissioners will not act improperly in allowing the certificate to pass with the signature of the bankrupt.

another as executor, a third as administrator, a fourth as assignee to a bankrupt, and a fifth in right of his wife. So one and the same person may be petitioning creditor, represent the whole body of creditors, and choose himself sole assignee under one and the same commission, which is not unusual, for it always happens when no creditor but the petitioning one appears till after such choice is made. His Lordship concluded: "This certificate is legally signed; there is no suggestion of concealment, nor any imputation of fraud; for as to the allegation in the petition, that the clerk to the commission and the father and son combined together in order to

defraud the creditors of the son, for that the debt of the petitioning creditor (the clerk to the commission) was collusive, and contracted on purpose to support a friendly commission,—as this allegation is not even so much as attempted to be made out by any sort of evidence, it must be totally disregarded; and I cannot presume fraud in any case, especially in such a one as the present appears to the Court. And indeed was there such collusion as suggested, the deceased has made the bankrupt's creditors ample amends, by enabling him perhaps to pay every one of them 20s. in the pound, though, may be, against his intention."

Ex parte FOULGER.—In the matter of PALMER.

C. of R.
May 8,
1834.

THIS was a petition to supersede, presented by the petitioning creditor.

A judgment creditor, who disputed the validity of the commission on the ground that the bankrupt was not a trader subject to the bankrupt laws, brought an action, and obtained a verdict against the validity of the commission.

The petitioning creditor, finding he could not support the commission, petitioned to supersede. The creditors who had proved were eleven in number, to the amount of 14,886*l.*, of whom ten, to the amount of 14,135*l.*, consented to the supersedeas. The creditor who refused to consent did not oppose this petition.

The petitioner positively denied any collusion with the bankrupt, and stated, he was solely actuated by the difficulty in which he was placed by his inability to enforce the commission.

It being known that the commission was disputed, no one would consent to become assignee.

Various orders, enlarging the time for the bankrupt's surrender, were obtained by the provisional assignee, the last of which expired after the action had been tried, without the bankrupt having surrendered, whereon the commissioners caused the bankrupt to be proclaimed for non-surrender.

The bankrupt was in Jamaica.

The petition was heard on the 13th of February 1833, when

Sir *George Rose* objected, that the petition could not be heard, as the bankrupt had not surrendered.

Where an action has been fairly tried, and the verdict is against the commission, and the bankrupt is abroad, the fiat may be superseded on the petition of the petitioning creditor, though the bankrupt has not surrendered.

1834.

Ex parte
FOULGER.
In the matter
of
PALMER.

Mr. *Turner*, for the petition, urged that there being a verdict against the validity of the commission it was invalid and void at law, and the bankrupt had committed no felony in not surrendering. But even if he had, this was not the petition of the bankrupt, to which the objection of non-surrender might or might not be a valid objection, but of the petitioning creditor, who had no influence over the bankrupt, and who was harassed by the pendency of a commission he could not support at law; and he cited *ex parte Roberts*, 2 *Rose*, 374; *ex parte Carling*, 2 *Gl. & J.* 35; *ex parte Lavender*, 1 *Rose*, 55; *ex parte Glynn*, *Mont.* 128; *ex parte Norcott*, *Mont.* 281.

In none of these cases had the commission been declared invalid at law, as this had.

The latest case is *ex parte Drake*, *Mont.* 490, where the Chief Judge said, "The only case exciting any doubt in my mind was *ex parte Nicholls*, 2 *Gl. & J.* 101. There the petition was presented within the forty-two days, as it was in the case now before the Court. But in *ex parte Nicholls*, justice required that the general rule should be relaxed, on the ground that it was absurd and impossible to surrender to a commission clearly illegal on the face of the proceedings themselves."

Is that not the case here? The proceedings themselves show that the trading would not support a commission; the bankrupt was described as a "ship owner." On the trial, which was before Lord *Tenterden*, the jury were inclined to find that there was a sufficient trading to support the commission; but his Lordship told them he would undertake to tell them that there was no such trading as would support a commission, whereon the verdict was given which upset this fiat.

Ex parte Clarke, *Mont. & Bli.* 384, is the only instance where the petitioning creditor presented a petition to

supersede, except *ex parte Wilkinson*, 1 Gl. & J. 387, and there the bankrupt concurred, which rendered the case suspicious.

The bankrupt is in Jamaica, and, being informed that the commission is invalid, refuses, as the petitioner is informed, to be at the trouble and expence of coming over to this country to surrender under an invalid commission, though he has expressed his willingness so to do if its validity were established.

1834.

Ex parte
FOULGER.

In the matter
of
PALMER.

The CHIEF JUDGE : —

In *ex parte Roberts*, 2 Rose, 374, the separate commission only was superseded, to give effect to a joint commission; the bankruptcy was not superseded.

I do not perceive that the petition being by the petitioning creditor creates any distinction.

I recollect that in *ex parte Clarke*, Mont. & Bli. 384, the circumstances of the case produced a strong impression on my mind that the petition was one in which the bankrupt was concerned.

Sir John Cross : —

I understand the petitioning creditor to say, I have wronged the bankrupt in issuing this fiat, and I desire to right him again by superseding it. The objection is, that the bankrupt ought first to surrender; but if the fiat be invalid, there may be no power over him under it.

This fiat is one which must be entered or registered in Jamaica, which will prevent the alleged bankrupt selling his estates there. As there exist cases where commissions have been superseded without surrender, it may deserve consideration whether it should not be done in this case.

1834.

Sir *George Rose* : —*Ex parte*
FOULGER.In the matter
of
PALMER.

If the fiat be superseded, we render the petitioning creditor liable to an action by the bankrupt.

I am of opinion, that as the bankrupt has not surrendered, the commission should not be superseded ; it may however be impounded, which will furnish all the protection the petitioning creditor can desire, and in every other circumstance have the same practical effect as a supersedeas. As soon as the commission is impounded, the messenger will give up possession, and the provisional assignment be vacated, and the petitioning creditor will be at liberty to bring an action for his debt.

Curia advisare vult.

May 8.

The CHIEF JUDGE : —

I have examined the proceedings in this bankruptcy, and see no reason to suspect that the action at law was not fairly defended by the petitioner, and properly decided against him. I am therefore satisfied that Mr. Palmer was not a trader within the purview of the bankrupt laws ; and as more than a twelvemonth has now elapsed since this matter was brought before this Court, and no creditor has interposed in support of the commission, I think that, under the peculiar circumstances of this case, the commission may be safely superseded without impeaching the propriety of the general rule requiring the previous surrender of the bankrupt.

Per Curiam : — Let the commission be superseded, with costs, as prayed.

CASES IN TRINITY TERM 1834.

Ex parte NOKES.—In the matter of NOKES.

L. C.
May 22,
1834.

MR. MONTAGU applied, at eleven o'clock, to Mr. Commissioner *Fonblanque*, to be heard at the opening of a fiat, on behalf of Mr. *Nokes*, against whom it had issued.

Where there are not the requisites to support a fiat, the Chancellor will recommend to the commissioner to hear counsel against the adjudication,—and if the bankruptcy be found, will stay the insertion of the advertisement in the Gazette, —and supersede.

Mr. *Fonblanque* stated (*a*), that it had always been his opinion that it would be expedient that the declaration of bankruptcy should be *ex parte*, as in the case of injunctions, but that the person declared bankrupt should be allowed a reasonable time to show cause against the declaration, and publication in the Gazette; but that his opinion had not been sanctioned by the legislature, and he must obey the law; and consequently he could not, without the consent of the petitioning creditor, permit counsel to attend.

The petitioning creditor refused.

Mr. *Montagu* then applied that the opening of the fiat might be deferred two hours, as, it being the first day of term, an application could not immediately be made to the Lord Chancellor for an order that counsel should be heard.

Mr. *Fonblanque* said he could not so defer without the consent of the petitioning creditor, which was re-

(a) As I well knew the fact to be.—B. M.

1834. fused. He accordingly proceeded, and received evidence in support of the fiat.

Ex parte
NOKES.
In the matter
of
NOKES.

Mr. *Montagu* immediately attended at Westminster, when a petition was presented to the Lord Chancellor, stating, that the petitioner had not been engaged in trade for seven years; that he had not committed any act of bankruptcy; and that the petitioning creditor had not any debt to support the fiat; that his only claim was on an attorney's bill, which had never been delivered, and on which, four years ago, he had commenced an action, and had been nonsuited, and, after the lapse of three years had commenced another action, in which, a few days previous to the issuing of the fiat, a verdict had been found against him.

The petition then prayed as follows:—

Your petitioner therefore most humbly prays your Lordship that the said fiat may be forthwith rescinded and annulled, and that your Lordship will be pleased to appoint an early day for the hearing of this petition; and that in the meantime, and until the hearing of this petition, the said *C. E.* (the petitioning creditor) may be restrained from proceeding with the prosecution of the said fiat. But if your Lordships shall not think fit so to order, then that your petitioner may be at liberty to attend by his counsel before the commissioner at the opening of the said fiat; if the said bankruptcy shall be found, that such finding may be returned previous to its insertion in the Gazette; and that until it has been so returned to your Lordship, that such insertion may be stayed; and that the said *C. E.* may pay all the costs of and incidental upon this application, &c.

Mr. *Knight* and Mr. *Montagu* applied to the Lord Chancellor for his Lordship's intimation to the com-

missioner, that counsel ought to be heard against the adjudication, which course had been pursued by Lord *Lyndhurst* in *ex parte Taylor, Mont. & Mac.* 427. They stated that no affidavit had yet been filed on account of the very pressing nature of the application, which would not permit a moment's delay.

1834.
—
Ex parte
NOKES.
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of
NOKES.

LORD CHANCELLOR:—On filing an affidavit that there is not any other debt claimable by the petitioning creditor, except that for the recovery of which he has been nonsuited in one action, and a verdict has been found against him in another, let it be intimated to the commissioner that I think this a proper case for the party to be attended by his counsel.

On returning to Mr. *Fonblanque*, at three o'clock, it appeared that the parties had been examined by the commissioner; but that, in order to hear the result of the application to the Lord Chancellor, the commissioner had not yet proceeded to adjudicate.

On being made acquainted with the intimation from the Lord Chancellor, Mr. *Fonblanque* adjourned the meeting for the adjudication till next day, saying, however, "It is still open to the other side to contend that counsel cannot be heard for the bankrupt. The Lord Chancellor intimates a wish, and when a Judge merely recommends in case after case, where, if he had power to order, he would do so, it might lead to an inference that he has no power to make an order." (a)

(a) Mr. *Christian* says, "I divide the whole jurisdiction of the Chancellor in bankruptcy into what I shall call direct and mandatory, and indirect and recommendatory. The mandatory part is expressly given him by statutes; the recommendatory part, which is now by far the greatest, results from his patronage or his appointment of the commissioners, and his power to displace them for

1834.

Ex parte
NOKES.
 In the matter
 of
NOKES.

Mr. *Montagu* applied for leave to inspect the depositions, which the commissioner permitted.

It appeared that there had not been any act of trading during seven years, that the act of bankruptcy was lying in prison six years ago, and that the petitioning creditor's debt was on an attorney's bill barred by the statute of limitations, but said to be recoverable by reason of the bankrupt having acknowledged the debt about five years and eleven months anterior to the date of the present fiat, by the insertion of the debt in his list of debts under a commission then issued against him.

On the next day Mr. *Montagu* attended, and was permitted to examine the petitioning creditor, &c., when the facts stated in the petition were confirmed, with the addition, that a rule *nisi* for a new trial had been granted since the fiat had issued.

Mr. *Montagu* proposed to call witnesses to disprove the allegations of the petitioning creditor.

Mr. *Fonblanque* refused to permit any evidence to be adduced on behalf of the bankrupt.

Mr. *Montagu* stated, that the permission given by the Chancellor would then be wholly useless, and that whenever counsel did attend in these cases before commissioners, they had always been accustomed to examine and to adduce witnesses, as was done in *re Bryant*, 1 *Rose*, 238, which was before the first list of commissioners, where counsel on both sides attended at the opening; and in *ex parte Harcourt*, 2 *Rose*, 214, before the third list of commissioners, where counsel also at-

ever, if they presume to act contrary to his recommendation or direction. This is not a sudden thought; long ago it suggested itself to my mind; it is confirmed by a thorough investigation of the subject; and it now remains for me to convince the professional reader that it is well-founded," &c. 2 *Christian*, B. L. 6, edit. 2d.

tended; and in both of which cases witnesses were examined on both sides, and in *ex parte Taylor, Mont. & Mac.* 429; and that, although this did not appear in the reports of the cases, the fact was so; and the observation made by counsel in *ex parte Taylor, Mont. & Mac.* 429, would, without this permission to discover the whole truth, remain unanswered, as it would be the greatest injustice to permit a man to be ruined by perjured witnesses, when, by the admission and examination of witnesses in the adjoining room, the conspiracy might be detected and the perjury exposed. (a)

1834.

Ex parte
NORRIS.
In the matter
of
NORRIS.

(a) Even if there had been all the requisites to support the fiat, it seems that after a lapse of time so considerable the Court would supersede, particularly if subsequent creditors would be injured: see *ex parte Bowes*, 4 Ves. 175; *ex parte Bourne*, 2 Gl. & J. 141. Perhaps the evil of *ex parte* declarations of bankruptcy was never so glaring as in the present case; an evil which, contrary to the intention of the Lord Chancellor and of every person who has reflected on the subject, has been very much increased by the recent alteration of the law. Previous to the 1 & 2 W. 4, c. 56, the fourteen lists differed in their practice: most of them permitted the attendance of counsel: the first list did so in *Bryant's case*, 1 Rose, 288; the third in *Harcourt's case*, 2 Rose, 203; the fourth permitted it, and the sixth; the seventh did not; the eighth did, as also the eleventh; and in any case where an application was made to the Chancellor, in consequence of a dictum in *ex parte Parsons*, 1 Atk. 204, his Lordship was in the constant habit of granting it. This dictum is as follows: "He would not make any order that Mrs. Parsons should be at liberty to be attended by counsel upon her examination, as is prayed by the petition, because it may be made a precedent in other commissions, and he thought an inconvenience would arise if allowed in every case, and therefore only recommended it to the commissioners in this particular instance to indulge Mrs. Parsons with counsel, but would make no order for that purpose." In *ex parte Taylor, Mont. & Mac.* 427, witnesses were examined on both sides, and thus more than once a conspiracy has been baffled, and a family saved from ruin. Under the old law, merchants and traders, though liable to be ruined by *ex parte* declarations, derived a protection from having the judg-

1834.

Mr. *Fonblanque* : — My opinion remains unaltered.

Ex parte
Nokes.
 In the matter
 of
Nokes.

Mr. *Montagu* then urged, that there being a verdict against the debt, which, if it had ever existed, was of

ment of three commissioners, who were liable to an action if they acted improperly ; under the present act the evils are much increased, no counsel is in any case to be admitted, and although the Chancellor may intimate that counsel ought to be heard, he is to remember, that Mr. *Montagu* was in this case admonished that the intimation of the Lord Chancellor is not an order which a judge of record is bound to obey. This state of the law, of which all persons of all parties have invariably complained, (Sir *S. Romilly*, Lord *Brougham*, Sir *E. Sugden*,) was not intended to be continued. In a debate in the House of Lords, Sept. 23, 1831, Lord *Wynford* said : " Under the present law a man could not be declared a bankrupt without the concurrence of three commissioners, and they ought not to adjudge a man a bankrupt until he had been heard in his defence. He must therefore protest against the merchants and bankers of this country being rendered liable to be posted in the *Gazette* as bankrupts, to be divested of all their property, their business stopped, and themselves and their families turned out of their houses on an *ex parte* hearing before one commissioner : the commissioner

might, indeed, if he found difficulty, advise with the other commissioners, but there were some men who never found any difficulty till the answer was heard."

—To this the Lord Chancellor answered : " Another observation of his noble and learned friend which struck him forcibly, was, his objection to one man in a case of bankruptcy ultimately making another a bankrupt ; but that was here provided for. His noble and learned friend also objected to give the power of making a man a bankrupt into the hands of the new judges. By the bill it certainly was provided that one judge could enter into the inquiry, but it was also provided, that the moment he found any extraordinary difficulty, either in point of fact or in point of law, he was obliged to call for further assistance. If, however, it was clear that the man had been a trader, and that he had committed an act of bankruptcy, as that he had a nose on his face, the commissioner then decided the case. If it were not a clear case, the commissioner adjourned it for further consideration, and then obtained the assistance of two other commissioners ; the three sitting together would decide upon the facts, and adjudge

many years standing, and the trading and acts of bankruptcy being so long ago, the bankruptcy ought not to be declared.

1884.

Ex parte
NOKES.

In the matter
of
NOKES.

accordingly. He apprehended, therefore, that a man would never be found a bankrupt by one commissioner in any but a straight-forward and plain case; at present, in straight-forward cases, one commissioner did the business, and the moment a necessity arose for what was called a private examination, which only took place in cases of difficulty, then the other two came to his assistance, and the whole three took the case into their hands. His object had been to select whatever was good or worthy of preservation out of the present system, and in this instance he proposed that the new commissioners should proceed on the principle on which all the lists now act, but with a great improvement in consequence of the provision which had been made for cases in which any thing like difficulties arose. His noble and learned friend had said, that there ought to be a notice given to a bankrupt before you take possession of his property, and that he ought not to be found a bankrupt *ex parte*. That was a subject, as his learned and noble friend well knew, which had been a question of long, anxious, and difficult inquiry amongst legislators and lawyers ever since the bankrupt laws ex-

isted. At present a man might be made a bankrupt and his goods taken possession of, and he know nothing whatever about it, It had been long objected to, but it was impossible to say more about it, unless some tolerable easy and safe means of abolishing the practice could be suggested. In Scotland, on a petition for a sequestration which is a proceeding in the nature of a commission of bankrupt, ten days time is given the party before execution; that is to say, a rule nisi was taken out, which expired in ten days, giving the party an opportunity of superseding the commission. It was one thing, however, to have a system of law long established in a country which had never known a different system, and it was another thing to introduce a practice into a country which had never known any thing whatever of it; and therefore it by no means followed, because the system worked well in Glasgow, that it would also be beneficial in Liverpool or London. That was no doubt a question well deserving of discussion; and accordingly he begged to state to their Lordships, and to his noble and learned friend, that it had received a great deal of consideration. He proposed, in the first

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Mr. *Fonblanque*:— There are the three requisites necessary to support a fiat; in bankruptcy, a petitioning creditor, whose debt is on a bill of costs, may issue a com-

instance, to introduce this system of the rule *nisi*, which was one of the principles on the sketch of the bill which he laid before certain learned individuals for consideration; but he withdrew it because it was agreed, that although the subject was always open to the modification which his noble and learned friend's long experience had suggested, yet that, at all events, the seizure of goods must be *ex parte*, though the making a man a bankrupt might take place after a few days delay; but then there would be this great difficulty, that though you seize the goods you could not prevent him from tampering with his creditor, unless something like a bodily attachment or arrest was introduced. They could not do this, however, without being the cause of as much mischief as would arise from declaring a man a bankrupt at once. On the whole, it was considered better that the property should be seized as heretofore, and that the point of bankruptcy should be left for the consideration of another tribunal.

But this provision was intended to be temporary only. In February 1831, the Lord Chancellor said, in the House of Lords, that his opinion was, that the adjudi-

cation of bankruptcy was not on the best footing. As the law now stood, any man who had a debt of 100*l.*, or any two men who had debts which amounted together to that sum or more, had nothing to do but to sign an affidavit and give a bond for the costs, in the absence of the party against whom the process was directed, in order to have any individual declared a bankrupt. They had but to allege that he had committed an act of bankruptcy, by being denied to a creditor at home, or by lying in prison for a certain time, and the docket, as it is called, was at once struck against him, though he might be a most respectable, nay solvent man, and though he neither knew what was going on, nor had an opportunity of defending himself. The consequence often was, that when the bankruptcy was contested, and the parties had to go into a court of law to support the commission, it was found that great injustice had been committed, and the assignees, who had not the power of bringing forward any other acts of bankruptcy, were seldom able to make good the original. The subject was, however, one of great difficulty, and the remedy suggested was in

mission without having delivered a bill, and there may possibly be a new trial. I shall therefore declare the bankruptcy.

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shape of a motion for a rule *nisi*, with power to show cause against it, but which carried with it certain objections of great force. The best course was to deal with caution, and if the legislature assented to his proposition of reforming the tribunal, an opportunity would be given by the working of the new system for the finding a remedy for so great an evil. The course he would suggest would be, that their Lordships should not take this matter under consideration until the new judicature was, as he hoped to see it, in actual and successful operation; and he had no doubt that the experience of the learned and skilful persons to whom the courts were to be confided would guide them to a sufficient remedy. He was happy to add, that during the last two days he had understood that his proposition had the entire concurrence of those who were most competent to pronounce an opinion upon it.

In the tract which Mr. *Montagu* published in 1851, he ventured to predict that this remedy would not be effectual, by saying, "I am much mistaken if any barrister will ever advise a person declared bankrupt to act upon this clause. What barrister will trust the happiness, I may

say the existence, of an injured merchant, who has been improperly declared a bankrupt, to an inferior tribunal, instead of the Court of King's Bench, or Court of Common Pleas, or the Court of Exchequer?

"Soon after the Court was established, some attempts were made, by persons declared bankrupts, to obtain relief by this clause; but as in *ex parte Jackson** it was determined that, upon an application for this purpose, new evidence might be adduced, the trader of course will not petition for a reversal, to deprive himself of rights which he would have upon a petition to supersede, or an action; and the provision is or soon will be a dead letter, whilst the oppression upon the merchants and traders is increased, as each commissioner has determined that no trader, against whom a fiat has issued, shall, at the meeting to declare the bankruptcy, be assisted by any counsel.

"Of the evil resulting from this state of the law instances too frequently occur. Upon the very day on which this is written, Mr. *Montagu* attended Mr. *Swan*

* *Mont. & Bl.* 401.

† January 6, 1834.

1834.

Ex parte
 NOKES.
 In the matter
 of
 NOKES.

Mr. *Montagu* submitted, that although an attorney might so issue a commission, yet the reason of that permission, as stated by Lord *Eldon* in *ex parte Howell*, 1 *Rose*, 312, proved it did not apply to this case: "Although the legislature had required a solicitor to deliver his bill a month before the bringing of an action on it, yet the statute did not apply to the case of suing out a commission of bankrupt. That it might be of a most iniquitous consequence if it did, as a solicitor would be in a worse situation than other creditors, who would sweep away every thing before the solicitor could interfere: but that it was quite of course upon a petition to refer the bill to the Master to be taxed after the commission, if it had not been previously delivered for that purpose." In this case, the bill not having been delivered, and six years having elapsed, no action can be brought on it; indeed, the solicitor has been nonsuited in one action, and a verdict has been delivered against him in another.

Mr. *Montagu* then asked that the opinion of a Subdivision Court might be taken, which was refused, and the bankruptcy declared.

ston at a consultation upon the possible evils which may result from a member of a firm going abroad by the direction of seven-eighths of his creditors in number and value to assist in recovering large debts due to the firm.

The following is a copy of their opinion:—

"We are of opinion that the departure of Mr. *A.*, in the circumstances stated, will not be an act of bankruptcy; but considering the mode of obtaining adjudication *ex parte*, we are not

sure that a commissioner may not be induced to declare the departure an act of bankruptcy, unless on application to the Court permission were given for an attendance on behalf of Mr. *A.* before the commissioners prior to adjudication; but we doubt whether such permission could be obtained."

The evil which existed under the old law is much increased, as no commissioner will permit the attendance of counsel.

An application was then instantly made to the Lord Chancellor to stay the insertion of the advertisement of the adjudication in the Gazette.

LORD CHANCELLOR: — Let the advertisement be stayed. But what jurisdiction have I? (a) If I am to

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—
Ex parte
NOKES.
In the matter
of
NOKES.

(a) Previous to 1 & 2 W. 4, c. 56, the Lord Chancellor had power to supersede. Is this power taken away? That the creation of a new court does not, without express words, abrogate an old court, and that suitors may elect between courts of concurrent jurisdiction, in which they will proceed, are positions which no lawyer can require to be proved. The 55 Geo. 3, c. 24, s. 2, the act by which the Vice-Chancellor's Court is created, enacts "that the Vice-Chancellor shall have full power to hear and determine all causes, &c. as the Lord Chancellor shall from time to time direct." This act did not in the slightest degree interfere with the jurisdiction of the Great Seal; nor does the 1 & 2 W. 4, c. 56, there not being any express words abrogating the Chancellor's jurisdiction.

By 1 & 2 W. 4, c. 56, s. 2, the Court of Review is to hear all matters which might have been brought before the Lord Chancellor, except as in the act is otherwise provided. By sect. 12 of the same act the Lord Chancellor is to issue fiats, and by sect. 19 the Lord Chancellor has

power, "upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, to order any fiat to be rescinded and annulled;" and in *ex parte Keys*, ante, page 226, the Lord Chancellor expressly says, (page 242,) "Under the act the Great Seal has reserved to it all power of annulling fiats in bankruptcy; consequently the Chancellor has full and ample power, without any qualification, of annulling a fiat, or of refusing so to do. The Great Seal is not restrained as to annulling fiats by any of the provisions of the 1 & 2 W. 4, c. 56. The Court of Review has in fact no power of itself to supersede; it indeed makes an order to that effect, but the Great Seal issues the *supersedas*.* The Great Seal issues the fiat, and the Great Seal supersedes the fiat.

"The Court of Review appears to me to have no power to supersede under the act. The power of annulling fiats is not taken away from the Great Seal,

* *Quære*, As to the propriety of one judge signing, as his own order, that of another judge?

1834. exercise jurisdiction, this Court may be occupied in hearing the many petitions presented to supersede fiats.

Es parte
NOKES.
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Mr. *Knight* and Mr. *Montagu* :—Your Lordship has jurisdiction; and the suitor is entitled to ask for the interposition of this Court in all cases; but if not in all, certainly in such a case as the present.

LORD CHANCELLOR :—Let this be argued when the petition comes on.

The Court of Common Pleas appointed an early day to hear the motion for a new trial, and before the hearing by the Chancellor the rule for a new trial was discharged.

June 4. This day the petition was heard, and the fiat ordered to be superseded.

The question of jurisdiction was not adverted to.

Mr. *Knight* and Mr. *Montagu* for the petition.

The petitioning creditor in person, *contra*.

No costs; the Lord Chancellor saying this was a peculiar case, to which the general rule did not apply.

and with issuing fiats the Court of Review has nothing to do.

"The section (19th) does not convey away the power the Great Seal possessed, but gives a new mode of exercising it, and says, annulling a fiat shall have all the effects of the old supersedeas, and leaves every thing else just

where it was. It leaves the Great Seal a substantive control in cases of supersedeas."

The law on this subject was agitated soon after the 1 & 2 W. 4, c. 56, came into operation. See *ex parte Langston*, *Mont. & Bl.* 145, S. C. 1 *Dea. & Ch.* 324.

Ex parte SMITH. — In the matter of JONES.

C. of R.
May 23,
1834.

MR. E. CHITTY moved that the time for opening a fiat might be enlarged (*a*), the period for which expired on the 24th. He stated that the fiat was directed to one of the lists appointed under the new act (*b*), that two of the commissioners were creditors (*c*), and the third absent in London.

Per Curiam: — Take an order to enlarge the time for opening.

On an application for enlarging the time for opening a fiat an affidavit must be made that the party *bond fide* intends to prosecute the fiat, that there is no composition deed pending or intended, and no connivance with the bankrupt.

(*a*) Any commission of bankrupt to be executed in the city of London shall be supersedeable for want of prosecution at the expiration of fourteen days, and not sooner after the date thereof; and if not to be executed in London, at the end of twenty-eight days. See Lord *Loughborough's* Order, 26th June, 1793.

shall be included in such return. Provided always, that it shall be lawful for the Lord Chancellor at any time to remove any person from the lists to be so returned, for such cause as shall to him seem fit. — 1 & 2 W. 4, c. 56, s. 14.

(*b*) That the judges who go the several circuits in England and Wales may be directed by the Lord Chancellor, from time to time, to return to him the names of such number as he shall think fit to require of barristers, solicitors, and attorneys practising in the counties to the said circuits belonging; and upon such persons being returned and approved by the Lord Chancellor, the fiat or fiats aforesaid not directed to the Court of Bankruptcy shall be directed to some one or more of such persons in rotation, to act as commissioners of bankrupt, according to the districts or places for which such persons shall be so returned, and to no other person than such as

(*c*) I do hereby order that upon all applications for commissions of bankruptcy requesting that the commissions may be directed to persons named, the solicitors, in delivering to my secretary of bankrupts the names of the commissioners to be inserted in the commissions, do at the same time certify that, according to the best of their knowledge and belief, none of the said persons intended to be commissioners or a commissioner are or is in any manner creditors or a creditor of the intended bankrupt. Lord *Eldon's* Order, 3d Feb. 1817. A commission in which two of the commissioners are creditors will be superseded. *Ex parte Matthews*, 1 Gl. & J. 165; *ex parte Kemp*, Mont. 257. — *Quare*, whether to renew be not the proper course?

1834.

Sir George Rose :—

Ex parte
SMITH.
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JONES.

It is stated that this application is rendered necessary by one of the commissioners being absent from the country, and in London. It should not be overlooked, that where parties are put to expence by the misconduct of the commissioners, the latter may render themselves liable to the costs, and this Court may have power to compel their payment.

If a fiat be not opened within the fourteen days, it is not thereby superseded, it is only supersedeable if any other creditor apply; if not, the parties may proceed to open at any length of time, and need not come to this Court. Indeed, our order will be no protection if any other creditor step in.

I beg to suggest to the Court the expediency of adopting the following rule of practice on application to enlarge the time for opening (a):—

Let the party applying to postpone the opening make an affidavit that he *bond fide* intends to prosecute the fiat; that there is no composition-deed pending or intended to be had recourse to; and that there is no connivance with the bankrupt. (b)

The CHIEF JUDGE:— It will be expedient to adopt that practice for the future.

(a) *Qu.* As to the propriety of this when the enlargement is, as it often is, for arranging with all the creditors?

(b) The following form of an affidavit is suggested:—

That he *bond fide* intends to prosecute the said fiat, and that there is not now any composition deed pending or proposed between the said bankrupt and his

creditors, nor, as this deponent verily believes, is any such deed intended to be had recourse to or to be proposed; and that this application for enlarging the time for opening the said fiat is not in pursuance of any connivance or understanding with the said bankrupt, or any person or persons on his behalf.

Ex parte MURRAY and others, partners. — In the matter of SMITH.

C. of R.
May 23,
1834.

MR. HICKS, the petitioning creditor, Mr. *Alexander*, the creditor's assignee, and Mr. *Kitchener*, the official assignee, presented a petition, praying that *Murray* and Co., solicitors, should pay to them a sum alleged to be part of the bankrupt's estate; at the same time a cross-petition to supersede was presented. The two petitions were heard in March 1833, when the supersedeas was ordered, and the petition presented by *Hicks* dismissed in the following terms: "It is ordered, that the said petition be and the same is hereby dismissed, and the said *Hicks*, *Alexander*, and *Kitchener* shall pay to *Murray* and Co. their costs of and occasioned by the said application."

If an official assignee be included in an order for payment of costs, the order may be enforced against him alone.

Murray and Co. selected Mr. *Kitchener*, and made the demand for the costs on him alone.

The petition stated, that the petitioners had frequently applied to *Kitchener*, and in particular that *John Murray*, on behalf of himself and his co-partners, served *Kitchener* with the above order, &c. on the 9th of April; "and your petitioner, *John Murray*, did, at the time of such service, on behalf of himself and the other petitioners, his partners, demand of the said *Kitchener* the said sum of 22*l.*, but the said *Kitchener* refused to pay the same; and the said *Hicks*, *Alexander*, and *Kitchener* have not, nor have any or either of them paid the same or any part thereof to your petitioners or any of them."

The petition prayed, that *Kitchener* might pay the 22*l.* within fourteen days, or stand committed.

Mr. *J. Russell*, for the petition, said the order asked was quite of course; if the official assignee unnecessarily joined in a petition, he must abide by the consequences;

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and that when an order is made that several shall pay, either may be selected.

Mr. *Bethell* for the respondent:—

There are three objections to this application: 1st, the petition does not state that the money "is still due and owing." Moreover it states, that neither *Hicks*, *Alexander*, nor *Kitchener* have paid; it should have gone on, "nor any person on their behalf." 2d, Neither *Hicks* nor *Alexander* have been served with this petition, and *non constat* but they might pay if they had. 3d, The Court will not permit solicitors, officers of the court, to resort to the official assignee, also an officer of the court, unless they previously apply to the other parties.

At the hearing I objected to the order including the official assignee, but the Court stated there would be no objection, as if Messrs. *Murray* proceeded against the official assignee, it would be at their peril.

Mr. *Russell*, in reply, said this was an application for an intermediate order only, not for the final order of committal; if the order of committal be asked, then the affidavit must strictly state that the money is still due and owing, and that the respondent has not paid the money, or any person on his behalf; but such strictness is not required on an application for an intermediate order, and when the party is served, it might be different if the application were *ex parte*.

The CHIEF JUDGE:—I have no recollection of having intimated that the official assignee was not to be proceeded against. It is not now a question, whether he should be ordered to pay the costs; he was included in the order made twelve months ago, and no steps have been since taken to rescind it. On occasions like the

present, no distinction can be made in favour of the official assignee; supposing the Court inclined to protect, it has not now the power. An order has been made against three persons to pay a sum of money; a demand is made on one, and he has not paid, and the order now asked is of course in regular practice.

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Sir *John Cross* :—I doubt whether the order contemplated that the official assignee would be alone called on to pay the costs. If the attention of the Court had been called to the point at the hearing, I, for one, should have been of opinion that he should have been protected. His counsel state that he did ask protection, and that the Court intimated the petitioners would proceed against him at their peril; if so, the order ought to be reconsidered before it is enforced against him by a second order. Under the peculiar circumstances of the case, I am desirous of ascertaining what the real intent of the Court was; till then I will suspend my judgment.

Sir *George Rose* :—

The order asked is of course, unless the respondent, being an official assignee, creates any distinction. I have no recollection that any such intimation as that alluded to fell from the Court; indeed I feel a difficulty in conceiving how the suggestion could have been made, considering that the fiat was superseded, under which, if in existence, the official assignee might perhaps have been sheltered. If the fiat existed, the Court might work out the equity of the official assignee against the other assignee; but this is a case of adverse litigation, independently of any fiat. In this case there is certainly no foundation in law, and I perceive none in equity, for protecting the official assignee.

The distinction taken by Mr. *Russell*, as to the

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If an order of committal be asked, the affidavit must state that the money is still due and owing, and that the party has not paid, nor any person on his behalf; but the same strictness is not required on an intermediate order.

form of the affidavit on intermediate or final orders, is correct. Here the attachment is not asked, only the intermediate order, consequently the applicant is not required to be so exceedingly strict as to form. When several persons are ordered to pay a sum, the demand may be made and enforced against any one of them. I should suggest, that the official assignee should have leave to make use of the names of Messrs. *Murray*, on an indemnity to make any use he can of the process of this Court, to proceed against *Hicks* and *Alexander*.

Ordered as prayed, with liberty to the official assignee to use the names of *Murray* and Co. on an indemnity.

C. of R.
May 30,
1834.

The Court will not interfere to direct assignees how to sell the estate.

Ex parte BELCHER and others. — In the matter of MABERLY.

MR. SWANSTON: — This is an application for the order of the Court as to the mode in which the assignees should sell portions of the bankrupt's property, part having been his absolutely, and in part he had but qualified estates, and the *boundaries* had been confused. Lord *Eldon* frequently made similar orders in the nature of intimations to the assignees, when any difficulty existed as to the proper mode of acting.

Per Curiam: — The assignees must act on their own responsibility. The Court sits to adjudge, not to act as counsel and advise; besides, it is due to the profession not to anticipate their advice. Though Lord *Eldon* sometimes made such orders, it was constantly with a declaration that it ought to be done reluctantly. The statute leaves the assignees a discretion and imposes a responsibility, and the Court ought not, on an *ex parte*

application, to interpose what might appear a protection, though in fact the order, if made, would be mere waste paper.

Sir John Cross dissentiente.

No order.

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Ex parte
BELCHER.
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Ex parte GIBSON.—In the matter of PHILLIPS. (a)

C. of R.
May 24,
1834.

THE assignees, with consent of a meeting of creditors, instituted a suit in equity. The cause was heard in April last, and the bill dismissed with costs. The

If a bill in
equity by as-
signees be dis-
missed with

(a) In the matter KINDERSLEY
CASTLE.*

Admiralty Court,
April 25, 1834.

The owner of a ship had given a bottomry bond, whereon a suit was instituted against him. He became bankrupt, and his assignee continued to defend the suit, in which the decision was ultimately against him, and a judgment pronounced in favour of the validity of the bond, with costs.

The ship was sold, but the proceeds were not sufficient to discharge the bond and costs of suit, and the assignee had no assets in his hands.

The question was, whether the assignee was personally liable for the costs?

Dr. Adams contended, that if

assignees elected to continue to defend any suit, and were unsuccessful, they were liable to costs, even though they have no assets of the bankrupt's in their hands.

In *Whitcombe v. Minchin*, 5 *Mad.* 91, the question was, whether assignees brought before the Court by a supplemental bill could be rendered liable to the costs of the whole suit? and the Vice-Chancellor said, "Assignees brought before the Court by supplemental bill might be liable for the costs of the whole of the suit, where they improperly resisted the plaintiff's demand."

It is peculiarly expedient to hold assignees liable to costs in such cases. Money being frequently advanced by foreigners on bottomry bonds, to enforce which they are occasionally compelled to institute a suit which is

If the assignees continue to defend a suit instituted against the bankrupt, which is decided in favour of the plaintiff with costs, and they have no assets, they are not personally liable, unless they vexatiously continued the defence.

* *Ex relatione.*

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Ex parte

GIBSON.

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of

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costs, they must
apply to the
commissioner
in the first in-
stance to allow
them out of the
estate.

assignee asked for these costs out of the estate. (a) The Lord Chancellor said he had no jurisdiction so to give them, and that the application should be made to the Court of Bankruptcy.

This was a petition by the assignee, praying that the costs incurred by him might be paid out of the estate.

Mr. Stinton for the petitioner.

Per Curiam:—In this case the assignees should apply to the commissioners in the first instance. If this Court were now to make the order, it would deprive the commissioner of that wholesome supervision which the legislature intended they should exercise.

Petition dismissed.

resisted by the obligor on the eve of bankruptcy, in order to stave off the payment; and if the assignees improperly carry on the resistance, and defend the suit, it would be grievance on the foreigner to be told, that though the judgment is in his favour, yet he must pay his own costs.

Dr. Dodson, on the other side, said the sentence of the Court had condemned "the ship, her tackle, and freight," and not the assignee, who had no assets of the bankrupt's, and who would have been liable to the credi-

tors if he had abandoned the defence of a suit which he ought to carry on.

Sir John Nicholls:—There can be no doubt as to the propriety of the dictum of the Vice-Chancellor in *Whitcombe v. Minchin*. Assignees would be personally liable if they improperly resisted any demand. In this case I shall not give costs against the assignee, unless it can be proved that he has acted improperly and vexatiously in continuing the defence.

(a) See *Turner v. Hibbert*, ante, 243.

CASES

IN

BANKRUPTCY.

Ex parte SEIGMOND RUCKER and Sons. — In the matter of DANIEL HENRY RUCKER and others.

C. of R.
May 24,
1834.

PREVIOUS to November 1831, the bankrupts carried on business in partnership as West India merchants and wool merchants.

Slaves in Antigua are real property, and may be equitably mortgaged by depositing a deed containing a schedule of their names, &c., though no registry of this deposit be made.

On the 5th of August 1831 the petitioners advanced to the bankrupts 1,000*l.*, and accepted accommodation bills to the amount of 4,000*l.*, and as security the bankrupts deposited the deeds of a plantation in Antigua and of the slaves thereon, accompanying the deposit with the following memorandum :

“ Messrs. *Seigmond Rucker* and Sons.

“ Dear Sirs,

“ In consideration of your having accepted our three several drafts upon you for 1,000*l.*, 1,000*l.*, and 2,000*l.*, dated this day, at one month, to our own order due 5–8th September, and at the same time of your having lent us in cash the sum of 1,000*l.*, making together the sum of 5,000*l.*, we hereby deposit and pledge with you the conveyance to us, for a valuable consideration, of the plantation called Yeamans in the island of Antigua,

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together with the slaves thereon and premises, executed by *C. Robertson* and *Eliza* his wife, on the 10th of July 1827, and recorded the same day."

This memorandum was registered in Antigua, on the 18th of June 1832.

The deed deposited contained a schedule of slaves.

The petitioners paid the bills accepted by them to the holders, and the bankrupts made several payments in reduction of their debt, and on the 17th of November 1831 the bankrupts owed the petitioners 1,529*l.* 0*s.* 9*d.*

On the 17th of November 1831 the commission issued.

This was the common petition of an equitable mortgage, praying that the lands and slaves might be sold, &c.

Mr. J. Russell for the petition: —

The assignees do not object to the prayer of this petition so far as concerns the land; but as to the slaves, they urge two objections to their passing to the mortgagee: 1st, that they are personal property, and consequently were in the reputed ownership of the bankrupt; and, 2d, if not in the reputed ownership, yet they did not pass to the mortgagee, for want of having been properly registered under the 59 Geo. 3, c. 120, s. 9. (a) But these positions of the assignees are not tenable. Slaves, being real property in the colonies, are capable of being mortgaged as against the assignees. *Meynell v. Moore*, 4 Bro. P. C. edit. Toml. 103, is decisive as a precedent in the case now before the Court; it was there decided, that by the laws of Antigua, negroes and other slaves are fixed to the freehold. By an act of the

(a) See *post*, page 485. This act was repealed, and the material parts re-enacted, by 5 Geo. 4, c. 113, s. 38.

Assembly of Antigua, made in 1692, it is enacted, "that all negroe and other slaves, after the date of this act, shall be of inheritance and affixed to the freehold, and the widow capable of being dowable thereof." (a) But the assignees object that the memorandum accompanying the deposit was not registered, as is required by the laws of Antigua, in order to pass slaves (b); but the mortgagee does not claim under the memorandum—the only use of which is to entitle him to the costs of his petition in this court (c) — his claim is through the deposit of the title deed, which deed does contain a schedule of slaves, and is duly registered. Besides which, the act as to registry does not apply to this case, which is an equitable mortgage, but only to legal mortgages. (d) In *Sumpton v. Cooper*, 2 Barn. & Ald. 223, a debtor deposited title deeds as a security, and afterwards executed an assignment of his interest in the premises to the same person, which was not registered as required by the 7 Ann. c. 20; and it was held that the assignment was void for want of registration, but that the equitable mortgage remained valid; Lord Tenterden saying, "as

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(a) Cited in *Meynot v. Moore*, 4 Bro. P. C. edit. Toml. 113. memorandum the mortgagee is entitled to his costs, notwithstanding parol evidence may be

(b) See the act, *post*, page 485.

(c) An equitable mortgagee, by mere deposit of deeds, must personally pay the costs of the petition; *ex parte Bignold*, May 11, 1826, cited 1 *Mont. & Gregg*. Dig. 98; *Anon.* 2 *Mad.* 281. This rule does not apply where the opposition of the assignees is frivolous and vexatious; see *ex parte Garbutt*, 2 *Rose*, 78; *ex parte Pigeon*, 2 *Dea. & Ch.* 118. But where there is a written

necessary to identify the deposit; *ex parte Fauxhall*, B. C. 1 *Gl. & J.* 101; *ex parte Trew*, 3 *Mad.* 372; *ex parte Sikes*, *Buck*, 350; *ex parte Horne*, 1 *Mad.* 622; *ex parte Garbutt*, 2 *Rose*, 79; *ex parte Waring*, 19 *Ves.* 472; *Anon.* 2 *Mad.* 281; *ex parte Brightens*, 1 *Swan.* 3, *Buck*, 149; *ex parte Reid*, *Mont. & Mac.* 114.

(d) See the clause, *post*, p. 485.

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to the statute of Anne, we think it cannot be held to apply to a case of an equitable mortgage; it refers only to the registration of deeds, and when there is merely a lien or equitable mortgage created by deposit of deeds, there is no instrument to be registered." [Sir George Rose:—It was decided in *Jones v. Gibbons*, 9 Ves. 407, that the object of the registry acts was the protection of subsequent purchasers, and that they had no effect to vitiate the conveyance for want of registration as between the party taking the conveyance, and him who conveyed, or his assignees under a commission of bankruptcy. The same was decided in *ex parte Coles*, 1 Dea. & Ch. 100.] Even supposing the objections valid, it does not follow that the assignees can be heard to state them. What right have assignees in England to property abroad?

Mr. G. Richards for the assignees:—

The question is, Whether the mortgagees be entitled to the slaves? Both parties are domiciled in this country, and the property is distributed under a fiat here, consequently the transaction must be governed by our laws, and not by those of Antigua.

A doubt has been suggested, whether the assignees in England be entitled to seize property in Antigua; they certainly may, as our bankrupt laws extend to our possessions and colonies all over the world: 6 Geo. 4, c. 16, s. 64. (a) *Sill v. Worswick*, 1 Hen. Bl. 665. (b)

(a) "That the commissioners in any of such lands, &c., and of shall, &c. convey, &c. all lands, which he might, according to the &c. in England, Scotland, Ireland, or any of the dominions, laws of the several countries, &c., have disposed, &c." 6 Geo. 4, c. 16, s. 64.

to his Majesty, and all interest to (b) The assignees are entitled to the bankrupt's personal pro-

Jones v. Gibbons, 9 *Ves.* 407, was decided long before the 59 Geo. 3, c. 120; moreover there are other reasons why it has no application to the present case. The general registry acts as to land were made for the protection of purchasers: in like manner the slave registry acts were made to protect the slaves. The title of the 59 G. 3, c. 120 (a), is, "an act for establishing a registry of colonial slaves in Great Britain, and for making further provision with respect to the removal of slaves from British colonies." The 8th section enacts, "That it shall not be lawful for any of his Majesty's subjects in this United Kingdom to purchase, or to lend or advance any money, goods, or effects upon the security of, any slave or slaves in any of his Majesty's colonies or foreign possessions, unless such slave or slaves shall appear by the return received therein to have been first duly registered in the said office of the registrar of colonial slaves; and that every sale, mortgage, or conveyance or assurance of, and every charge or other security upon any slave or slaves not so appearing to be registered, which at any time or times after the said 1st day of January 1820 shall be made or executed within this United Kingdom, to or in trust for any of his Majesty's subjects, shall be absolutely null and void in respect of any such unregistered slave or slaves." And the 9th section is yet stronger, enacting, "That no deed or instrument made or executed within this United Kingdom,

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perty abroad, unless the foreign law prefer the title of another, and the presumption seems to be in favour of the foreign law being the same as the law of England; but the law respecting the right to real property seems not to be finally settled. See the cases on this subject collected in 1 *Mont. & Gregg*. Dig. 505. In practice, however, the assignees in this country constantly seize and dispose of real property abroad.

(a) This act was repealed, and the material parts re-enacted by the 5 Geo. 4, c. 113, s. 38.

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whereby any slave or slaves in any of the said colonies shall be intended to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any estate or interest therein created or raised, shall be good or valid in law to pass or convey, charge or effect any such slave or slaves, unless the registered name and description, or names and descriptions, of such slave or slaves shall be duly set forth in such deed or instrument, or in some schedule thereupon indorsed or thereto annexed, according to the then latest registration or corrected registration of such slave or slaves." The words "which are intended to be mortgaged," clearly refer to equitable mortgages.

It might be admitted, for the sake of argument, that as between the mortgagor and the mortgagee there was a good title to the slaves; but, that as the 59 Geo. 3, c. 120, was made for the protection, not of purchasers, but of the slaves themselves, and as the requisite formalities of registration, intended for the benefit of the slaves themselves, were not gone through, that therefore the transaction was altogether void.

It has been argued that the petitioner stands on the deposit of the title-deed, which contains a schedule of slaves, and which deed was itself regularly registered; but he cannot so pass by the memorandum. The petition states, "that the said memorandum or agreement was on or about the 18th day of June 1832 duly registered or recorded in the said island of Antigua, as by the certificate and official copy of the same when produced will appear." In Antigua, therefore, this memorandum is the petitioners' title-deed; without it they can claim nothing; by having themselves registered, they admitted it required registration; and it is void as to the slaves, as having no schedule of slaves. What title could the petitioners establish through the mere

deposit of the deed, which would affect the slaves? The great object of the 59 Geo. 3. was, that it might be ascertained on the instant who was the real owner of the slave, an object which would be utterly defeated if the validity of the present transaction were established, because then, while the real ownership was secretly transferred to the mortgagee, the apparent registered owner would be the mortgagor, who would remain in possession.

If the Court should be of opinion that the objection of want of registry is not sufficient, yet the mortgagor is not entitled to the slaves, as they were in the reputed ownership of the bankrupt, having been in his order and disposition. Slaves may be real property in Antigua for some purposes, but it would lead to great absurdity to declare that such was the case for all purposes. Suppose a slave were to be assaulted or killed, must the owner bring an action of trespass *quare clausum fregit*, or an action of waste, for this damage done to his real estate? It lies with the petitioner, therefore, to prove that slaves are real estate to all intents and purposes, and especially so as to pass to a mortgagee as against the assignees under a bankruptcy. [Sir John Cross :—A person who possesses no landed estate whatever often is the owner of a gang of slaves in gross, which he lets out.] But the assignees mainly rely on the want of registration, which in this case renders the transaction as utterly void as an attempt to transfer a ship would be if the requisites of the ship registry acts were not complied with.

The CHIEF JUDGE :—

This being an important question, which may affect other cases, the Court will take time to consider its judgment. Nevertheless I will now state my present

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opinion, which will save the necessity of any further attendance, if I should not change it.

The petitioners claim as equitable mortgagees of certain premises and slaves, of which the title-deeds were deposited with them in 1831, accompanied by a memorandum.

This claim is opposed, as to the slaves, on the ground that there was no valid mortgage under the 59 Geo. 3, c. 130, and that even if there be, yet that the slaves passed to the assignees as having been in the reputed ownership of the bankrupt. The first question depends on the interpretation of the 59 Geo. 3. It is familiar law, that a deposit of a title-deed creates a good equitable mortgage of the land, and of all property thereon, except such as is of a nature to be in the reputed ownership of the bankrupt. It is contended, that as the names of the slaves are not inserted in the memorandum, there was no mortgage of them, even in equity. If we consider the 8th section of 59 Geo. 3, c. 120, by itself, nothing appears to prevent the proprietor mortgaging his slaves by depositing the title-deed, if the deed deposited contain a proper schedule, and had been properly registered; but the 59 Geo. 3, c. 120, s. 9, enacts that "no deed or instrument made or executed within this United Kingdom, whereby any slave or slaves in any of the said colonies shall be intended to be mortgaged, sold, charged, or in any manner transferred or conveyed, or any estate or interest therein created or raised, shall be good or valid in law, unless the registered names of the slaves be duly set out in such deed or instrument." The consequence of this section might be, that if the claim of the mortgagees were under the memorandum of deposit as an instrument of mortgage, it would be void for want of the names of the slaves. But the petitioner claims through the deposit of the deed; and

the question is, whether the 9th section of 59 Geo. 3, prevents such a claim as against the assignees. My present impression is, that the 9th section would not prevent the passing of slaves by any deed in which their names were set out, and does not prevent them being passed by deposit of a deed which does contain a schedule thereof. I am of opinion that the slaves being scheduled in the deed deposited takes the case out of the act as to registry.

Assuming the transaction to be good as an equitable mortgage, then the question of reputed ownership arises. The local act of Antigua declares the slaves to be part of the freehold. It has been suggested, however, that slaves might be in gross, and consequently but goods and chattels. If, by the laws of Antigua, slaves be real estate, it does not appear to me that their being held in gross can alter their nature, and convert them into goods and chattels; besides which, it being known in the island that slaves are treated as real property, and frequently mortgaged, they would not come within the intent of the bankrupt act as to reputed ownership, the possession not always being an index to the property.

Sir John Cross : — I wish to suspend my opinion till final judgment is given.

Sir George Rose : —

The question arises in this Court for the first time. Though the act of parliament introduces the necessity of registration, yet that only affects purchasers, and has no effect to render void agreements between the parties themselves.

In Chancery, slaves have often been considered as real property for all purposes. The Registry Act expressly speaks of "mortgages of slaves." If they can be

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effectually mortgaged, there is an end to the reputed ownership, as whatever can be effectually mortgaged, and is known and understood to be commonly the subject of a mortgage, will not, if mortgaged, pass to the assignees as having been in the reputed ownership.

The only question then remaining is, whether the slaves, not being included in the memorandum, be passed to the mortgagee, or whether the registry act interferes, and the title to them be in the assignees? The wording of the act appears strong at first sight; section 8 provides that the slave shall not be property unless he be registered, that is, if he be not registered, the omission manumits him; that is his privilege, and does not affect the right of property to him, if it exist anywhere: section 9 considers him as property, but enacts that he shall not be transferrable unless certain forms be gone through; then we arrive at the question, what is the nature of that property under a bankruptcy? If the property in the slaves be not in the mortgagee, where is it? Equity considers that done which is agreed to be done; in the present case, do the slaves altogether cease to be property, or is there not enough to bind the conscience of the mortgagor so as to enable a court of equity to call on him to do whatever may be necessary to complete the legal formalities?

The necessity for the registry of a ship depends on a statute; but then it is to be remembered that ships were mere chattels, the property in which, at common law, could only be passed by actual delivery of possession, till the legislature interposed, and enacted that ships might be transferred by deed alone, without delivery of possession, provided certain forms as to registry were observed; if not, the ship remains as it was at common law—a mere chattel liable to the statute of James. Real property of all kinds is independent of the statute of

James. And if the party be liable at common law to damages for a breach of contract, courts of equity view the amount of damages as the value or amount of the interest intended to be given. If the contract touch real property, courts of equity give effect to it to the extent that it affects the conscience of the party.

If slaves be real property, the moment the owner deposited the deed containing a schedule of slaves, he did what was equivalent to a covenant to mortgage them.

Then does the 59 Geo. 3, c. 120, affect or controul this general rule of law or equity? Its policy does not require that the Court should decline to interfere to declare such transactions as the present to be good equitable mortgages, in cases where the slaves are known and clearly to be recognized. Its object was only to protect the slaves from secret conveyance, whereby slavery might be perpetuated. I therefore cannot hesitate in declaring that, in my opinion, the slaves in question are not goods and chattels within the 72d section of the 6 Geo. 4, c. 16.

Per Curiam : — The question whether the slaves be real property or not being one of fact, the Court will take time to consider whether it will be expedient to have a reference to one of its officers to report on that point.

The CHIEF JUDGE : —

The 5 Geo. 2, c. 7, s. 4, enacts that “ the houses, lands, negroes, and other hereditaments and real estates, &c., shall be liable to, &c., all just debts, &c., and shall be assets for the satisfaction thereof in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond, &c.” This was, however, repealed by the 37 Geo. 3, c. 119. The statutes of

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which the courts in this country take notice treat negroes as realty; it consequently lies with the assignees to prove that they are personalty, which they have not done.

The act of the Assembly, dated the 21st July 1692, referred to in the argument, recites that "many persons heretofore deceased stood possessed of a good quantity of lands and tenements, and number of negroes; some of which persons made their wills and testaments, nominating their executors therein, and others died intestate, leaving their negroes, and other goods and chattels, to be disposed of by the administrator or administrators to be appointed: which said executors and administrators, by virtue of their executorship and administration, inventoried and appraised the said negroes, and disposed of them as other chattels, which oftentimes proved a ruin to the interest or estate, and left the widow and children in a bad condition."

"For the prevention thereof for the future, be it and it is enacted by the authority aforesaid, that all negroe slaves and other slaves, after the date of this act, shall and are hereby declared to be inheritance, and affixed to the freehold, and the widow capable of being endowed thereof; provided always, that any executor or administrator may inventory the said negroes, but not take them into his custody, to the intent that if there shall not be sufficient goods and chattels to pay the deceased's debts, that then the said negroes are liable to be taken for payment of the said debts, and be as chattels for that purpose, and no otherwise."

The consequence is, that unless the assignees can show something more to induce the Court to entertain a doubt as to the fact that negroes are real property in Antigua, it will not be necessary there should be any reference as to the point of fact whether real or personal property.

Sir John Cross : —

On perusal of the deed it becomes clear that as against the assignees the slaves were attached to the land when the mortgage was made, casting on the assignees the burthen of proving the contrary.

As to the 5 Geo. 3, it does not appear to me that the assignees have proved that the slaves were not registered: against the bankrupt it must be assumed they were, till the contrary be proved, it not laying in the mouth of the bankrupt to allege they were not duly registered; and the assignees represent him.

Sir George Rose : —

The general impression of the profession is that slaves, like an estate *per autre vie*, go to the executor for payment of debts, but for all other purposes are real property.

Whether or not the slaves be in the reputed ownership does not altogether depend on whether they were chattels or real estate; the question in reputed ownership often is, not whether they be chattels, but, admitting that, whether they be such of which the possession draws along with it the reputation of ownership.

Ordered as prayed. (a)

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(a) It has been determined by his Majesty in Council that slaves are chattels in St. Christopher's, *Dalrymple's MS.* vol. i. 75. And they are chattels in the Bahamas, *Sheppard's Practice of St. Vincent*, 119. They are also chattels at St. Nevis by a special act of the President and Council there in 1699. But in all the other colonies they are real property.

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A mortgage was made of premises and machinery, which included a steam-engine, &c. erected for trade purposes, and fixed to the freehold; the mortgagors continued in possession: Held, 1st. the steam-engine might be removed; 2d, it was well mortgaged, and not in the reputed ownership.

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THIS was the petition of *Lloyd* and Co., bankers, and prayed the usual order in cases of equitable mortgage, for a sale of the premises, fixtures, and machinery mortgaged.

Walmisley, being the sole owner of certain freehold premises, entered into partnership with *Ogden*, and *Walmisley* and *Ogden* thenceforth occupied the premises as cotton-spinners, and erected a steam-engine, &c. for the purposes of their joint trade.

Ogden and *Walmisley* kept a banking account with the petitioners, and in 1822 owed them 1,822*l.* on the balance of such account; and on the 1st of June 1833 *Ogden* deposited with the petitioners the leases of certain leasehold premises, accompanied with a memorandum, which, after setting out a list of the title-deeds deposited, thus concluded:—"These papers are placed in the hands of Messrs. *Jones, Lloyd*, and Co., as security for what they may think fit to advance to *Ogden* and *Walmisley*." On the third of August 1822, *Walmisley* deposited with the petitioners a lease of a freehold piece of land, on which was situated a mill and other buildings; this deposit was accompanied by the following memorandum:—"These deeds of the Canal Mill at Hallingwood are placed in the hands of Messrs. *Lloyds* and Co. as security for what they may think proper to advance to *Ogden* and *Walmisley*, by *Charles Walmisley*; the buildings alone are insured for upwards of 2,000*l.*, machinery, &c., 2,000*l.* more."

On the 16th of November 1833 a fiat issued against *Ogden* and *Walmisley*. When the fiat issued there was owing to the petitioners 2,777*l.* on the balance of the banking account.

The petition prayed that the petitioners might be

declared equitable mortgagees of the premises, and of the mill and steam-engine, boilers, steam pipes, main shafting, and principal mill-gearing and fixtures in the mill and buildings, &c.

By agreement, the property in dispute was sold, and the proceeds awaited the decision of the Court.

Several contradictory affidavits were filed, as to whether the landlord was generally owner of the steam-engines, &c. in that neighbourhood, and as to whether the particular engines in question could be removed without injury to the freehold. The most precise of these was by *James Drow* of Manchester, appraiser and auctioneer, who deposed that he had been a valuer of machinery in cotton and other mills for twenty years; that he sold the steam-engine, gearing, and gas apparatus at the Canal Mill, and that he was present part of the time when it was removed by the purchaser; that he carefully examined the situation and manner in which the steam-engine stood, and it could be very readily removed without injury to the freehold; that it was the invariable practice in Manchester and the neighbourhood, in all cases when buildings, steam-engines, and other things are erected for the purposes of trade, for the tenant to remove them at the end of his tenancy, or for the landlord to buy them from the tenant; that in almost all cases the steam-engines in Manchester and the neighbourhood can be removed without material damage to the freehold; that the steam-engine at the Canal Mill was put up in the following manner, — there was a large stone put into each wall, which was of brick, an aperture was left in each wall over each large stone, then there was a bed cut into each stone fully the depth of the entablature plate or beam, the ends or bearing parts of this entablature plate were put into those beds, and hot lead poured to fill the crevice or vacant

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parts, to keep it firm in its resting on those stones; that the weight of the walking beam rests entirely upon this entablature and a cast-iron centre pillar, which rests on the stone foundation, put in for the engine but not fixed to the freehold; that the engine could be very easily removed by raising the entablature plate with a screw jack, and by that means the end of the entablature plate or beam raised out of the bed cut into the stones, and then lowered down by common blocks without any injury to the building, and without disturbing or injuring the stones in the least degree; that the building and stones must necessarily have been erected before the steam-engine was put up; that it was customary for the owners of cotton mills in Manchester and the neighbourhood to erect the mill, and for the tenant to put up the steam-engine.

The bankrupts, being owners of the building and steam-engine, let different compartments of the building to different persons whose business required machinery driven by a steam-engine; these persons usually furnished their own machines. All these machines were worked by the bankrupts' steam-engine, which communicated with the different parts of the building by means of long shafts, the lengths of which were composed of different pieces not otherwise connected than by cog wheels, some of these lengths of the shafts being at right angles to others.

Mr. *Swanston* and Mr. *Myhre* for the petition:—

The mortgagees claim the steam-engine and the works attached, down to what is technically designated the first motion, that is, what is generally understood by the steam-engine itself exclusive of any machinery it works. They also claim the gas apparatus.

Excluding all considerations as to bankruptcy, and

viewing the transaction as one between mortgagor and mortgagee only, the memorandum, by referring to the insurance on the machinery, shows the intent to be that it should be included in the security. That the machinery in question belongs to the mortgagee appears from several cases.

In *Stewart v. Lomb*, 1 Brod. & Bing. 506, the jury found that a mill, mortgaged together with the land, was not a fixture; yet it was held that a creditor of the mortgagor could not take it in execution, though the mortgagor had remained in possession. *Winn v. Ingilby*, 5 Barn. & Ald. 625, decided that fixtures in a house were not liable to be seised in execution under a *fiery facias*, the house being in the possession of the person against whom the execution issued. In *Colegrave v. Dias Santos*, 2 Barn. & Cres. 76, the owner sold a freehold house. No mention was made in the conveyance of fixtures, nevertheless they were held to be passed; and even if they had not, yet the owner, after giving up possession, could not maintain an action of trover.

But the assignees contend, that, bankruptcy having intervened, the machinery, and some of those things which the petitioner alleges to be fixtures, were in the reputed ownership of the bankrupt. But the doctrine of reputed ownership has no application to fixtures, nor to such chattels as are subject to a custom of being let, and the possession of which does not necessarily carry the reputation of ownership. These propositions were established in the time of Lord *Hardwicke*, and have been strengthened by a series of decisions down to *Coombs v. Beaumont*, 5 Barn. & Adol. 72, and *Rufford v. Bishop*, 5 Russ. 346.

In *Hubbard v. Bagshaw*, 4 Sim. 326, the owner of a cotton mill, in which there was a steam engine, boilers, &c. mortgaged the whole, but remained in possession

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until his bankruptcy. In that case, as in that now before the Court, the entablature plate of the engine was fixed to the freehold, and it was held that the steam engine did not pass to the assignees, not having been in the order and disposition of the bankrupt at the time of his bankruptcy.

The Court here called on the respondents.

Mr. *Spence* and Mr. *Wigram* for the respondents:—

The buildings, of which the deeds were deposited, were conveyed to *Walmisley* before the machinery was built. He entered into partnership with *Ogden*, and then the two jointly erected the machinery, which is therefore a trade fixture; consequently the cases cited do not apply. It is contended that only the buildings passed to the mortgagee. [Sir *George Rose*:—It was partnership property; but will there be any difficulty in finding that the one partner had authority from the other to pledge it, in order to obtain an advance of money for partnership purposes?] Machinery, though erected after the deposit of the deed, yet, if a fixture, would of course pass to the mortgagee in an ordinary case. But we contend these were not fixtures, but chattels, which therefore passed to the assignees, as having been in the reputed ownership of the bankrupt.

The present case must be governed by the decision in the great cause of *Trappes v. Harter*, 3 Tyrr. 603, S.C. 2 *Cromp. & Mee.* 153, which was decided after much consideration, and on a review of all the cases on the subject. It is as follows:—

In 1797 premises in Lancashire, described as “land, a dwelling house, machine house, and other buildings and erections,” were conveyed in fee to one of several partners. The conveyance stated them to be then in

the possession of that partner and another of his then partners. Machinery and utensils were afterwards placed thereon by the firm, for the purpose of carrying on the business of calico printers. The machinery and utensils were firmly fixed to the freehold, yet in such a manner that they might be easily removed without material injury to themselves or the buildings. In that part of the country similar articles, so fixed, were commonly bought, sold, and removed, without treating them as fixtures. In taking stock yearly between 1804 and 1825 the buildings and land were valued and classed separately from the machinery and fixtures, but the whole was always dealt with and considered as partnership property. In 1828 two of the partners,—then seized in fee of the freehold land and buildings under a conveyance not mentioning machinery or fixtures,—mortgaged them for a term, and also the steam-engine, mill-geering, heavy gear, millwright work, fixed machinery, and other matters and things standing and being in or upon the thereby demised buildings, works, and premises, which in any manner constitute fixtures and appendages to the freehold of the same, or any part thereof. They remained in possession and carried on the works till 1829, when they compounded with their creditors, and afterwards till they became bankrupts. In April 1831 their assignees sold and removed the machinery and utensils, except two steam-engines with the first motion and main shafts attached to them, and two water-wheels, which supplied power to the rest.

Such is the statement of the case; and it was held, after deliberation, that the machinery and utensils so removed, having been affixed to the inheritance for the purposes of trade only, in a place where, as such, they would have commonly been removed, were not to be

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taken as part of the inheritance, but as personal estate only, which passed to the assignees of the bankrupts.

In this case of *Trappes v. Harter* (a) are several *dicta* by the Judges of great importance, and directly applicable to this case. Lord *Lyndhurst* (at page 615) says, "The question is whether these articles are fixtures, and it arises between mortgagees and a mass of other creditors;" and (at page 617) his Lordship observes, "If several partners put up machinery on the freehold of one of them, for the purpose of carrying on their partnership trade, how does it become the property of that one partner who is owner of the freehold?" and *Bayley, B.* (page 622) having observed, "There is another point, viz. that the legal interest in these articles is not in the persons who, having the legal estate in the premises to which they were fixed, mortgage those premises," Lord *Lyndhurst* said, "That assists you in showing that the bankrupts did not intend to pass them by their mortgage deed; and if the words of that deed did not necessarily pass them, what passed between the parties to it may be taken into consideration to show their intentions." His Lordship further says (page 625), "In taking the stock it appears that the land and buildings were constantly placed under one head, and the machinery under another. It also appears that machinery of this description is in that part of the country constantly bought and sold without reference to the freehold. As between landlord and tenant therefore, it is clear that such machinery, put up by the tenant, might be removed by him. The bankrupts were the reputed owners of the machinery, and, in consequence of their being so considered, obtained extensive credit. We are of opinion therefore, that, with

(a) 3 *Tyr.* 603, S. C., 2 *Crompt. & Mee.* 153.

respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor, and not to the heir, and that it was the partnership estate of the bankrupts." And (at page 628) he observes, " Now these authorities lead us to the conclusion, that, where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." And in conclusion his Lordship observes (page 629), " Under all these circumstances it appears to us that there is sufficient to satisfy the terms of the mortgage deed, without including the machinery in question, and that it neither passed nor was intended to pass by that deed. Then if it did not so pass, it is to be looked upon as personal estate, separate from the property mortgaged, and therefore as belonging to the assignees." And *Bayley, B.*, says (page 618), " Here the question is, were these articles fixtures or not? That depends on the time they were erected. If they were erected by *Henry Feilding*, then they were his; if erected by him and others, it may turn out that *quoad* other parties they may be goods and chattels."

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Sir George Rose : —

The question in *Trappes v. Harter* (a) was the intent : Lord *Lyndhurst* says (page 628), " We are of opinion that it did not pass by the mortgage deed, and that it was not intended to pass by it." The intent is the first question in the case now before the Court. On that is not the memorandum conclusive?

(a) 3 Tyr. 603, S.C., 2 *Crompt. & Mee.* 153.

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The distinction laid down by the cases applicable to the present question — where bankruptcy intervenes — is not, whether the property can be removed as between mortgagor and mortgagee, but whether, as between the mortgagee and the assignees, trade fixtures can be removed without injuring the premises. If they be so fixed to the freehold that it will be seriously injured by the removal, *cadit questio*. The case of *Trappes v. Harter* (a) appears to decide that where the assignees might remove the property without injury to the freehold, then they can defend themselves in an action of trover, on the ground that the property was chattel. No conveyancer but would be of opinion that the property passed by the deed if fixed to the freehold. In *Trappes v. Harter* (a) Lord *Lyndhurst* goes through all the cases, in order to arrive at the point whether the property in question before him were personal or real; and he decided that, for the purposes and benefit of trade, it was chattel. *Coombs v. Beaumont* (b) would decide that as between mortgagor and mortgagee there could be no doubt that if the parties intended, the machinery would have sufficiently the character of realty to pass: but then it is open to the argument, that bankruptcy having intervened, creates a difference, and that then the injury to the premises must be considered. In *Trappes v. Harter* (page 628) is the doctrine on which I rely as governing the case now before the Court. Lord *Lyndhurst* there said, “Now these authorities lead us to the conclusion, that where utensils and machinery are erected by the owner for the purpose of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and when

(a) 3 Tyr. 603, S. C., 2 *Crompt. & Mee.* 153.

(b) 5 *Barn. & Adol.* 72.

this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate."

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In this case, the amount of injury is too trifling to be considered, while in *Trappes v. Harter*, 3 Tyrr. 611, it is stated that it would cost 150*l.* to put the premises into complete tenantable repair.

Mr. Spence and Mr. Wigram : —

Several cases have decided, that, on a deposit of title-deeds, a house is included though not mentioned, but that fixtures are not.

In *ex parte Quincey*, 1 *Ath.* 477, it was held, that on a mortgage of a brewhouse and the appurtenances, the utensils used in brewing did not pass.

Sir George Rose : — Fixtures, or any other kind of property, may be mortgaged ; but in the event of the bankruptcy of the mortgagor, continuing in possession, the question arises, whether the assignees or the mortgagee be entitled to them ? If they were trade fixtures, the assignees are entitled to them as such ; this had been held in favour of trade, and following the legislative rule (a), which says the construction of the Bankrupt Act is to be in favour of creditors on doubtful points ; the case of *Clarke v. Crownshaw*, 3 *Barn. & Adol.* 804, shook that law, but it was set up again by Lord *Lyndhurst* in *Trappes v. Harter*, 3 *Tyr.* 603, who held that such fixtures were removable, if it could be done without doing too serious a damage to the freehold. (b)

(a) 6 Geo. 4. c. 16. sect. 135. mortgagee. *Boydell v. M^r Michael*,

(b) Tenant's fixtures are not in Trinity Term 1834, 1 *Crompton*, the reputed ownership of the *Meeson & Roscoe*, 177. bankrupt, so as to prejudice a

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Mr. Spence and Mr. Wigram :—

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In *ex parte Austin*, 1 *Dea. & Ch.* 307, on the petition of an equitable mortgagee of part of the bankrupt's estate by deposit of deeds, the question was, whether fixtures were included in the security? It was contended that they were within the operation of the 6 Geo. 4, c. 16, s. 72, and passed to the assignees as having been in the reputed ownership of the bankrupt. Sir *George Rose* said, "I have no hesitation in saying, that where fixtures are capable of removal, as between landlord and tenant, without injury to the freehold, they are within the order and disposition of the bankrupt." No judgment, however, was given in that case, but an inquiry was directed as to the nature of the property.

It has been urged, that where a custom to let machinery exists, that prevents the doctrine of reputed ownership from attaching; such is not the case, as was decided in *Lingard v. Messiter*, 1 *Barn. & Cres.* 308. *A. B.* was the owner of machinery, which was seized under an execution, and conveyed by a bill of sale to a creditor, who afterwards demised them to *A. B.* at an annual rent; *A. B.* subsequently became a bankrupt. The counsel for the defendant urged, that it was proved that there was a usage to rent such machinery, and cited *Horne v. Baker*, 9 *East*, 215; but it was held, that the machinery passed to the assignees, as having been in the reputed ownership of *A. B.*

In that case, Mr. Justice *Bayley* said, "When once it is proved that the bankrupt has been the owner, and has continued in possession till the time of the act of bankruptcy, the presumption is, that he then continued in possession in the character of owner, and therefore a proof of those facts is, *prima facie*, evidence that the bankrupt is both reputed and real owner. In this case it was proved that the bankrupt was once the owner of

the machinery, and the jury have found that it continued in his possession to the time of the act of bankruptcy; that being so, the reputed ownership must be presumed to have continued so long as the possession continued." And the other judges made observations to the same effect. It is submitted that this case of *Lingard v. Mes-ster* is so similar in its circumstances to that now before the Court, as to be a precedent to be followed.

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The case stood over, that the judges might read through the affidavits to ascertain whether the machinery could be removed without much injury to the freehold.

Cur. ad. vult.

Mr. *Swanston* in reply was stopped by the Court.

29th.

The CHIEF JUDGE:—

This was a petition by equitable mortgagees in the usual form, praying for the sale of the land, and mill and buildings erected thereon, mentioned in certain title-deeds deposited with the petitioners by way of security for monies to be advanced by them, and also of the steam engine, gas works, and certain parts of the machinery fixtures thereon.

The assignees raised no objection to so much of the petitioners' claim as was confined to the land and buildings, but they claimed a right to remove the steam engine, gas works, and all the machinery, as the goods and chattels of the bankrupts, either as not included in the mortgage to the petitioners, or at all events as left in possession of the bankrupts as the reputed owners, and therefore as passing to the assignees under the 72d sect. of 6 Geo. 4, c. 16.

Pending the petition in this Court, the matters in dispute were, by mutual consent, removed and sold, and

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the question submitted to us is, to whom the proceeds of that sale ought to be paid.

For the petitioners it has been urged, that the steam engine and other things in dispute were affixed to and formed part of the freehold, and therefore necessarily constituted part of the estate mortgaged to them, and could not be goods and chattels of the bankrupts, either as the true or reputed owners. And if, in law, they must be considered between these parties as part of the freehold, both the questions raised by the assignees must, as it seems to me, be answered in favour of the petitioners.

But though I am of opinion that the petitioners are entitled to the proceeds of the matters in dispute, it is not on this short ground; for it appears to me, that though annexed, in fact, to the building and land, they still retained, in law, their character of personal chattels; and therefore it will be necessary to consider the two questions separately. In looking through the cases on this subject, a distinction seems to have been made between things annexed to the soil by the owner of the freehold, and those annexed by a tenant during his term; and the distinction is this, where the annexation is made by the owner of the freehold, the fixtures become, without reference to the nature of the fixtures or the purpose for which they were annexed, a part of the freehold itself, and as such descend to the heir, pass by conveyance of the land without being specified, and cannot be taken in execution as the chattels of the owner: *Steward v. Lombe*, 1 Brod. & Bing. 506; *Winn v. Ingleby*, 5 Barn. & Ald. 625; *Place v. Fagg*, 4 Man. & Ry. 277. But where any fixture is annexed by the tenant, it does not necessarily become a part of the freehold, but its character as realty or personalty depends on the nature of the fixture, and the purpose for which

it was annexed; *Hen.* 7, c. 36; *Winn v. Ingleby*, 5 *Barn. & Ald.* 625; *Place v. Fagg*, 4 *Man. & Ry.* 277; *Trappes v. Harter*, 3 *Tyrw.* 608.

In this case, *Walmisley* was the sole owner of the freehold, but having entered into partnership with the other bankrupt, *Ogden*, the premises were occupied by the partners, who erected the steam engine and other things in dispute, for the purposes of their joint trade. The firm therefore may be taken as occupying the premises as mere tenants, and the circumstance of one of the firm being also owner of the soil will make no difference, for that was the case in *Trappes v. Harter*, 3 *Tyr.* 608; and in page 617 of that report Mr. Baron *Bayley* asks, "Was the machinery originally erected at the joint expence of the concern, and if so, was it the property of *Henry Fielding* only, or of *Henry Fielding* and the other partners?" And upon the counsel arguing that though put up at the joint expence it nevertheless became the property of *Henry Fielding*, Lord *Lyndhurst* says, "If several partners put up machinery on the freehold of one of them, for the purpose of carrying on the partnership trade, how does it become the property of that one partner who is owner of the freehold?" and in the decision of that case the firm was considered as erecting the machinery in dispute as mere tenants.

Looking at the machinery now in question as fixtures erected by the bankrupts, as tenants, for the purposes of trade, the first question would be, were the fixtures such as the bankrupts were entitled to remove during the term? That they were, is plain from a long train of authorities, the substance of which is summed up by the Vice-Chancellor in the case of *Hubbard v. Bagshaw*, 4 *Sim.* 388, in which he says, "The general rule is, that whatever is affixed to the freehold, whether by the tenant or not, shall remain, and not be removed by the

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tenant, but be part of the freehold ; one exception to the rule is the case where the tenant, for the purposes of trade, does at his own expence affix machinery or erect buildings ; in that case he may remove them during the term, or during his possession after the term." And though the machinery in question is more intimately connected with the buildings than the other part of the machinery, to which no claim is set up by the petitioners, yet it does not appear to me to have been so permanently incorporated with the building as to make it irremovable by the tenant, on the ground of destructive waste.

The principle upon which the tenant's right to remove things annexed by him to the freehold for the purposes of trade depends, has been differently viewed by high and learned authorities, as may be seen by contrasting the observations of Chief Justice *Gibbs* in *Lee v. Riesen*, 7 *Taunt.* 191, and the remarks of Mr. *Amos* in his able treatise on fixtures, with the cases which I shall have occasion to mention presently. But the right of the tenant's executor to such fixtures at his death, and the right of the sheriff to take them in execution under a *fi. fa.* against the tenant's goods and chattels, seems to me to confirm the principle adopted in *Trappes v. Harter* (a), that in all questions between the landlord and tenant, they retain, during the term, their character of personality, and do not become a parcel of the realty until the tenant shall have left them annexed at the end of the term, when, according to Lord *Holt's* language in *Poole's* case, *Salk.* 368, "they became a gift in law to him in reversion, and are not removable." That is, as I understand it, they remain the personal chattels of the tenant during the term, and then, if left, they become

(a) 3 *Tyr.* 603, S. C., 2 *Crompt. & Mee.* 153.

the property of the owner of the freehold, and by the unity of title they lose their character of personalty, and become in law as well as in fact, and for all purposes, a part of the freehold; and it may be observed, that in the case of *Lee v. Ridsen*, 7 *Taunt.* 190, the fixtures in question had been annexed by the landlord, and though by him sold to the tenant had never been severed from the freehold, of which at the time of the sale they unquestionably formed a part, both in law and in fact; the decision therefore of that case does not interfere with the view that I take of the question, which, however, I should not venture to maintain against the dictum of so eminent a lawyer as Chief Justice *Gibbs* if I did not find the principle recognized in several decided cases.

It is the principle upon which the Court of Exchequer decided the case of *Trappes v. Harter* (a), and may be traced in the cases in the year books, 20 *Hen.* 7, 13, 21 *Hen.* 7, 26, and in *Winn v. Ingleby*, 5 *Barn. & Ald.* 625, *Place v. Fagg*, 4 *Man. & Ry.* 277; and is expressly referred to by Lord *Kenyon* in *Penton v. Robarts*, 2 *East*, 90: Lord *Kenyon* says, “the old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier, but in modern times the leaning has been always the other way in favour of the tenant, in support of the interests of trade, which has become the pillar of the state;” and, further on, his Lordship adds, “this is a description of property divided from the realty.” And this is still more explicitly stated by Lord *Ellenborough* in *Ehves v. Maw*, 3 *East*, 53, “In the three principal cases on the subject” (which he particularizes) “the Court may be considered as having decided mainly on this ground, that, where the fixed instrument, engine or utensil, was an accessory to a

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matter of a personal nature, that it should itself be considered as personalty;" and then he proceeds to show how, in the cases referred to, the matters in dispute were accessory to a matter of a personal nature, and to show that such exceptions were confined to cases connected with trade.

The same may be inferred also from the reasons given by C. J. Dallas in *Buckland v. Butterfield*, 2 Brod. & Bing. 54: he concludes the judgment of the Court by saying, "We agree with the learned Judge in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste." Now there was no question in that case that the conservatory which had been removed was, in fact, attached to the soil; but the question was, whether in law it was removable by the tenant, and the language used implies that the Court thought, that if it had been removable, it would not have been at law considered annexed to the freehold.

The same principle seems recognized by *Bayley, J.* in *Place v. Fagg*, 4 Man. & Ry. 277, in which that learned Judge says, "Fixtures, which the tenant has a right to remove, may be treated as chattels in a proceeding against the tenants; but as against the owner of the estate they are part of the freehold;" and in *Trappes v. Harter (a)*, the same learned Judge says, page 122, "There is another point, viz. that the legal interest in these articles is not in the person who, having the legal estate in the premises to which they are affixed, mortgaged those premises." And Lord *Lyndhurst*, in giving the judgment of the Court, in page 628, after citing at length the earlier cases on the subject, says, "Now these authorities lead us to the conclusion, that where

(a) 3 Tyr. 603, S. C., 2 Comp. & Mee. 153.

utensils and machinery are erected by the owner for the purposes of trade only, in a neighbourhood where such utensils and machinery as those would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." And if the distinction, to which I have already alluded, between the cases where the fixtures become the property of the owner of the freehold, and the cases where they remain the property of the tenant who has annexed them to the soil, be kept in mind, all the other cases cited on the other side, of *Horn v. Baker*, 9 *East*, 215; *Clarke v. Crownshaw*, 3 *Barn. & Adol.* 804; *Coombs v. Beaumont*, 5 *Barn. & Adol.* 72, may be reconciled with the decision of *Trappes v. Harter* (a), and with the view that I am now taking of the case before this Court; for in all those cases the fixtures had become the property of the owner of the freehold, and had therefore lost their character of personalty, and had become, in law, a part of the freehold itself. In *Horn v. Baker*, 9 *East*, 215, though the fixtures were originally put up by the tenant, yet the lease of the premises to which they had been annexed had expired in 1804, and had been renewed in 1805. The fixtures, therefore, forming a part of the premises let by the renewed demise, would have been no longer removable, but would, for every purpose, form a part of the freehold, according to the case of *Thresher v. E. London Water Works*, 2 *Barn. & Cres.* 608; *Naylow v. Collinge*, 1 *Taun.* 19:

In all the other cases the fixtures in question had been annexed before the demise to the tenant, and had therefore unquestionably become, for every purpose, a part of

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the freehold; the observation, therefore, of Mr. Justice *Littledale*, in *Coombs v. Beaumont*, 5 Barn. & Adol. 72, that the steam engine was part of the freehold, and did not come under the description of goods and chattels, is not at all at variance with the view taken by the Court of Exchequer in *Trappes v. Harter*. (a) And the observation of Mr. Justice *Park*, that he never knew that any distinction was made between such fixtures as would be removal. between landlord and tenant and such as would not, does not seem to refer to the general character of fixtures put up by the tenant as personalty, or part of the realty, but to the question whether they would ever in that case come within the class of goods and chattels contemplated by the legislature in the 72d of stat. 6 G. 4, c. 16: this question I shall have to consider presently; but it must first be ascertained whether the things in dispute passed by the contract of mortgage to the petitioner. The deposit of the deed was by *Walmsley* only, the owner of the freehold. If the machinery in question formed no part of the freehold, the deposit of the deed would not of itself necessarily convey any interest in the fixtures which belonged to the firm. But, looking to the whole transaction, and finding that the premises were in the occupation of the firm, that the advances were to be made for the benefit of the firm, that the mere building would probably be a very inadequate security of itself, it is difficult to believe that it was the intention of the parties to confine the security to the mere land and buildings. But when we refer to the written memorandum, and find the machinery, and the amount at which it was insured, specified, it is impossible to doubt that the machinery formed part of the security upon which the petitioners were to make their advances;

(a) 3 Tyr. 605, S. C., 2 Crompt. & Mee. 153.

and I think we may fairly take *Walmisley* as mortgaging, for himself, his own freehold interest in the land and buildings, and, as agent for the firm, mortgaging the leasehold interest and the property of the firm in the machinery.

The question, then, before the Court is reduced to this,—are the fixtures goods and chattels within the meaning of the 72d section of the Bankrupt Act? This question the decision of *Trappes v. Harter* (a) leaves wholly untouched, because the Court having decided that the machinery in question was not included in the mortgage, it passed to the assignees as part of the property of which the bankrupt was the true as well as the apparent owner. In the case of *Coombs v. Beaumont*, 5 Barn. & Adol. 72, Mr. Justice *Littledale*, after observing that the steam engine in that case was part of the freehold, and did not come under the description of goods and chattels, says, “Independently of that, property affixed to the freehold is not within the intent of the statute, because the possession of such property does not create a visible ownership in the bankrupt so as to procure him credit;” and Mr. Justice *Parke* adds, “The steam engine, if affixed to the freehold, clearly does not pass to the assignees, because it does not come under the description of goods and chattels in the 6 Geo. 4, c. 16, s. 72; this was determined in *Horn v. Baker*, 9 East, 215, and since that case, as far as my experience goes, I never knew that any distinction was made between such fixtures as would be removeable between landlord and tenant, and such as would not.” And in *Stewart v. Lombe*, 1 Brod. & Bing. 506, Mr. Justice *Richardson* says, “though in the estimation of the jury this was considered as a chattel, yet it is *quodammodo* annexed to the land, and very distin-

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guishable from that species of goods and chattels of which the property usually accompanies the possession, and no false credit is promoted by the occupier not being actually the owner."

Adopting, therefore, the principle laid down in *Trappes v. Harter* (a), and viewing the things in dispute in the character of personalty rather than as part of the realty, I nevertheless concur in the opinions that I have last cited, that they do not fall within the description of goods and chattels included in the 72d section of the Bankrupt Act. It is not necessary in this case to decide whether any and what description of tenant's fixtures may be considered within the range of that section (b); it is enough to say, that the facts disclosed in the affidavit clearly exclude these from its operation, for the things in dispute appear to have been firmly attached to the floor and walls of the building, only capable of being detached by severing parts of the building itself, though without doing any material damage, and were besides such things as are frequently though not invariably put up by the landlord and let with buildings of this description, and to all appearance formed part of the building itself; they are therefore very distinguishable from that species of property which seems to have been within the contemplation of the legislature when it passed the enactments in question, and I am therefore of opinion that the petitioner is entitled to the relief he seeks.

Sir John Cross : —

I always understood that money might safely be advanced on a mortgage of trade fixtures; such has been the law from *Ryall v. Rolle*, 1 *Atk.* 165, S. C. 1 *Ves. sen.*

(a) See *Boydell v. M^r Michael*, Trinity Term 1834. 1 *Crompton, Meeson, & Roscoe*, 177.

(b) 3 *Tyr.* 603, S. C. 2 *Crompt. & Mee.* 153.

348, decided eighty-five years ago, down to *Horn v. Baker*, 9 East, 215. The only doubt which ever attached arises from the late case in the Exchequer (*a*), the point decided in which appears to have been somewhat misunderstood.

In *Horn v. Baker* (*b*), the Court decided that the stills would have passed to the assignees if they had been the property of the bankrupt, but that, being the landlord's, they did not so pass. That case governs the present.

Concerning the misapprehension as to the point decided by *Trappes v. Harter* (*a*), it appears that the respondents in the case now before the Court conceive that the Court of Exchequer decided that the articles there mentioned could not be made the subject of a mortgage; such was not the decision: the Court held that those articles were not included in the mortgage-deed; if they had been so included, the judgment, as to some of them, would have been different.

In the case now before the Court there is no mortgage-deed, the petitioners being equitable mortgagees by deposit of the title-deeds.

When that deposit was made, the steam-engine and other machinery, &c. in question was upon the premises: it might be a difficult question to decide, whether or not the steam-engine and machinery were what is usually understood by the term "part of the freehold;" it is, perhaps, immaterial to the present question.

The building was the property of one of the partners, and the machinery was the property of the two; the memorandum, however, carries us over that difficulty, as it is a plain intimation to the bankers, that they were to have the security of both the buildings and machinery,

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(*a*) *Trappes v. Harter*, 3 Tyr. 603, S.C. 2 Crompt. & Mee. 153,
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and that they so understood is clear from the fact that they advanced more than the value of the buildings alone.

The great and essential distinction between *Trappes v. Harter* (a) and the present is, that there the property was not mortgaged, here it is. *Horn v. Baker*, 9 East, 215, was a case between landlord and tenant; the law, as regards the point now before the Court, is the same whether the parties be landlord and tenant, or mortgagor and mortgagee. A person who erects a machine, and then mortgages it and remains in possession, is a tenant.

Much evidence has been adduced as to the existence of a custom for persons in possession of mills to hire machinery. This evidence concurs with the reason of the thing, and with the cases, to prove that manufacturers are never considered the owners of machinery merely because it is in their possession.

There is consequently no doubt of this general rule, that this sort of steam-engine is *primæ facie* understood to belong to the landlord.

Sir George Rose : —

I am unable to add any thing new to the judgment of my learned colleagues. It is certainly not easy to reconcile the practice in bankruptcy with the general rule of law, or with the particular cases decided independently of bankruptcy. The rule in bankruptcy, during the last twenty years at least, has been to consider what would be removeable between landlord and tenant, or heir and executor and creditor; and, accordingly as it was so removeable or not, to consider it to be or not to be in the reputed ownership. So long as the trader rendered his possession valuable by his mere possession and use, the property was considered as separate from the freehold.

(a) 3 Tyr. 603, S. C. 2 Crompt. & Mee. 153.

The test usually was, the right of the tenant to remove as against the landlord; and the question was, can the removal be made without injury to the freehold? I am of opinion that *Trappes v. Harter* (a) has decided the present question. In that case Lord *Lyndhurst* embodies in clear words what has been, and I hope will be continued to be the practice in bankruptcy. I entirely concur with and adopt what his Lordship says, "where such utensils and machinery as these would commonly have been removed, and when this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate," and where this may be done without violation of the contract between the parties.

The Court were desirous to read through the affidavits, to ascertain the point whether the property could be removed without injury to the freehold. I am of opinion they could not be removed without such an injury to the freehold as would support an action for damages. Then the only question is, whether the property be included in the memorandum in dispute. The assignees urge it was not. But when I find the money was borrowed by a partner, and then applied to partnership purposes, and then consider the terms of the memorandum, I can come to no other conclusion than that the intent was to mortgage the machinery, and that he was acting as the authorized agent of the partnership. The argument as to their being fixtures may be tried by one familiar instance. The whole stock of a nurseryman consists in young trees; they are not considered as affixed to the freehold, though trees in other cases are; the exception is by custom.

Ordered as prayed.

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A stranger to the commission obtained an assignment of the creditor's proofs, and therewith bought part of the bankrupt's estate from the assignees: Held, the Court had no jurisdiction to set aside the purchase.
Cross, J., dissenting.

Ex parte HOLDER.—In the matter of HOLDER.

IN 1811 a commission issued against *Holder*, under which *Spence*, since dead, and *Keddy*, were chosen assignees. *Holder* was entitled to a certain life estate under his marriage settlement; but owing, as *Holder* now asserted, to a misapprehension, he declared before the commissioners that he had no interest whatever, and that the same was to the separate use of his wife. His wife being summoned and examined, admitted she had the settlement in her possession, but refused to produce it. *Holder* and his wife, in pursuance of a power in the settlement, created certain charges on the estate, which became the subject of a bill in the Exchequer, under which *Rushworth* was employed as solicitor. *Rushworth* afterwards bought up all or almost all of the interests of the creditors who had proved under the commission, and about the end of the year 1824 applied to *Keddy* to convey to him all the bankrupt's interest, if any, in the premises in question, which he accordingly did. The consideration was stated to be 50*l.*, but in fact no money passed; but *Rushworth* delivered to *Keddy* receipts from the creditors, who had proved to that amount.

It appeared that the annual value of the property so sold was 190*l.*

This was a petition by the bankrupt, stating that he had a life interest in the property thus sold to *Rushworth*, and praying that a renewed fiat might issue, under which *Keddy* and *Rushworth* might account for the petitioner's estate and effects, &c.

This petition was heard on the 27th of April 1833, when the commission of 1811 was ordered to be impounded, with liberty to the bankrupt, within one month,

to take out a renewed fiat, in the name of any creditor or creditors, if the Lord Chancellor should think fit, such renewed fiat to be executed before a London commissioner; and the further consideration of the matters of the petition was adjourned till after a new choice of assignees under the renewed fiat, if the creditors should think fit to have a new choice, *Keddy* and *Rushworth* being restrained from voting in such choice; and all further directions and costs were reserved.

A renewed fiat issued in May 1833, and a new assignee was chosen thereunder.

This was a fresh petition by the bankrupt, praying, amongst other things not necessary here to state, that *Rushworth* might be ordered to deliver up to the new assignee the premises so conveyed to him, &c.

The new assignee was served, but did not appear.

Mr. *Bacon*, for *Rushworth*, objected that the Court had no jurisdiction as against *Rushworth*, who was a stranger to the commission.

Mr. *Koe*, for the petition, contended, that as *Rushworth* did not claim adversely to the commission, the Court had jurisdiction; and that as in *ex parte Gould*, 1 Gl. & J. 231, the Court exercised jurisdiction to compel the completion of a purchase where proper, it could do so to set aside a purchase when fraudulent; and that the property constituted part of the estate, and, as the petitioner insisted, still formed part of the estate, the sale being fraudulent and void, which again gave jurisdiction; and that though in *ex parte Gould* the purchase was under a general order, yet, where the party voluntarily came in, what distinction was there?

Mr. *Swanston* for *Keddy* the surviving assignee:—
The circumstance that the property forms part of the

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estate does not alone give the Court jurisdiction; debts owing to the estate cannot be recovered in this Court.

Mr. *Bacon*, in reply, was stopped by the Court.

The CHIEF JUDGE :—

It appears to me that we have not jurisdiction to make the order prayed. The jurisdiction exercised by this Court is not more extensive than that of the Great Seal when sitting in bankruptcy before the institution of this Court.

The Court has no other jurisdiction, as regards purchases of the bankrupt's estate, than to enforce a purchase made under an order of the Court.

In *ex parte Gould*, 1 Gl. & J. 231, the Court certainly interfered to enforce the completion of the purchase; but that was on the ground that the sale having been under an order of the Court, the purchaser who bought under that order had so far placed himself within the jurisdiction as to enable the Court to recall or to enforce such purchase. But it is contended that *Rushworth* came in under the commission. I do not find that he did so. It is true he bought up debts and procured releases, which he handed over to the assignees as the consideration of the purchase. As assignee of the debts the Court would have jurisdiction over him in relation to these debts, so as to prevent his interfering in a new choice of assignees, if the Court think it necessary in the present case to have new assignees who might inquire, in the proper court, into the transaction now in question; but we have no jurisdiction over him as a purchaser.

The consequence is, the petition must be dismissed with costs as to *Rushworth*.

Sir John Cross : —

The subject matter of the dispute is part of a bankrupt's estate. *Rushworth* asserts some right to the dividends; he therefore is a creditor under the commission, that is, the creditors have assigned their rights to him, and he represents them; and, with the right to these dividends, he buys, or pretends to buy, part of the bankrupt's estate, and buys of the assignee. *Rushworth* claims an interest under the commission, and not adversely thereto.

I feel great anxiety not to disclaim jurisdiction. Lord *Eldon* frequently reprobated the practice of so doing in order to avoid trouble. It is true that his Lordship has also often declared that he ought to be very careful not to extend his jurisdiction in bankruptcy, because there was no appeal, which now exists. On questions of jurisdiction, we must not allow ourselves to be confined within precisely the same limits which formerly restrained the Great Seal, because the Bankrupt Court Act, section 2, not only gives this Court "superintendence and controul in all matters of bankruptcy," but goes on to give us "power, jurisdiction, and authority to hear and determine, order and allow all such matters in bankruptcy as now usually are or lawfully may be brought, by petition or otherwise, before the Lord Chancellor." The act not only uses the word "jurisdiction," but also "superintendence and controul," which is to be exercised not only over such matters as the Lord Chancellor actually did hear, but such as lawfully might have been heard.

Our jurisdiction being objected to, I ask myself, is this a matter in bankruptcy? and I find that the subject matter of the petition is or was the bankrupt's estate, purchased under a commission, sold by an assignee, and the consideration, debts, the right to which is acquired

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under the commission, and the purchaser appearing therefore in the character of a creditor, and it is alleged that the purchaser and the assignee collude together, so that the result is, *Rushworth* purchases for 50*l.* an estate worth 190*l.* per annum.

It therefore appears to me, that the property, the purchaser, and the vendor are within the jurisdiction. *Rushworth* bought debts, which constitute the consideration of the purchase, and which were proved under the commission; he has no claim to the estate, except through the assignee, who claims under the commission.

This question concerns the creditors, the estate, and the general administration of justice; the petition has been a year before the Court, and the respondent contends we ought now to dismiss the petitioner to Chancery.

If, in fact, *Rushworth* were a stranger to the commission, we should have no jurisdiction; but he is not: on the contrary, he is intimately connected with the commission.

Six months ago an order was made, entertaining jurisdiction against *Rushworth*, and further directions reserved.

It is said there is no case where the jurisdiction asked has been exercised in bankruptcy; there is, however, a case in which a purchase was enforced, *ex parte Gould*, 1 *Gl. & J.* 231.

The present case is a sale by an assignee, an officer of the court; a sale to a creditor, or the representative of several creditors; and a sale of a bankrupt estate. Does not all this give us jurisdiction?

Sir *George Rose*: —

Probably the extensive jurisdiction contended for might be usefully conferred on this Court, but at present we have it not. We have jurisdiction over the estate,

but have none to bring property within the estate. We possess the jurisdiction formerly exercised by the Lord Chancellor, and no more, and it would have been of course before the Lord Chancellor to dismiss this petition.

A state of circumstances might be supposed which would give us jurisdiction over *Rushworth*, to refuse him his dividends or to expunge the debts proved, but we have none to set aside the purchase. Suppose he resisted our order, and we committed him, might he not bring an action, or perhaps obtain a prohibition?

Ex parte Gould, 1 Gl. & J. 231, was decided on the familiar law, that when a Court makes an order for sale it can enforce that order.

Feeling how confined is the jurisdiction of this Court, and desiring it to be enlarged, I yet cannot find we have jurisdiction in cases of this kind.

The petition, as to *Rushworth*, dismissed, with costs. (a)

(a) That the Court have no jurisdiction over strangers to the fiat, see *ex parte Pease*, 1 Rose, 242, S.C., 19 Ves. 47; *ex parte Bennett*, 10 Ves. 382; *ex parte Crow*, Mont. & Mac. 281; *ex parte Wackerbeth*, 2 Gl. & J. 156.

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June 2,
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Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show serious injury will accrue.

Ex parte PERKINS.—In the matter of PERKINS.

THIS was a petition by the bankrupt, that the commissioners might be ordered to appoint a time for his passing his last examination, which had been adjourned *sine die*.

There had been five adjournments; the two first were on the application of the bankrupt; at the third examination it appeared that he had made a bill of sale, and that the subsequent examinations were adjourned on account of the commissioners not being satisfied concerning the bill of sale. The immediate reason for the last adjournment was, that the bankrupt stated he could not give a satisfactory account without further investigation of his books and papers.

Mr. *Stewart* for the petitioner.

Mr. *Swanston* and Mr. *Rolfe* for the commissioners.

The assignees were served, but did not appear.

Per Curiam:—The Court presume that there is good reason for the adjournment until the contrary is proved. This is a matter proper to be left to the discretion of the commissioners, and the Court will not interfere, unless some improper conduct be proved against them, or unless the bankrupt can prove that very serious injury will be done by his not passing his last examination. This petition must be dismissed with costs.

When there is no charge against commissioners they need not appear.

Mr. *Swanston* and Mr. *Rolfe* asked, that if the bankrupt could not pay the costs, the commissioners might take them out of the estate.

Per Curiam :— We will not make that part of the order. As there was no charge made against the commissioners, they need not have appeared. It is to be wished commissioners would not appear in such cases. The assignees were served, and the commissioners might have directed them to appear with the proceedings.

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Ex parte LOMAS. — In the matter of LOMAS and COOKE.

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May 30, &
June 12,
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THIS was a petition by the bankrupt for his allowance.

The petition, after setting out the petition presented in *ex parte Lomas, ante*, page 437, proceeded to state that Mr. Commissioner *Fane*, on the 20th of May 1834, certified that, it having been admitted before him that the net produce of the joint estate of the petitioner and *Cooke* was 731*l.* 7*s.* 4*d.*, and it appearing to him that not more than one moiety of such could be deemed to have been the estate of the petitioner within the meaning of the words "his estate," contained in the 128th section of 6 Geo. 4, c. 16, he had given the petitioner credit for the sum of 365*l.* 13*s.* 8*d.*, as the net produce of part of his estate; and that, it being admitted before him that the separate estate of the petitioner amounted to 13*l.* 9*s.*, and that, there being no separate creditors of the petitioner, such sum was carried over to the credit of the joint estate, he had given the petitioner credit for the further sum of 13*l.* 9*s.*, as the net produce of his estate. And Mr. Commissioner *Fane* did thereby ascertain the statutable allowance of the petitioner at the sum of 37*l.* 18*s.* 3*d.*, being 10*l.* per cent. upon 379*l.* 2*s.* 8*d.*, the amount of the sums of 365*l.* 13*s.* 8*d.* and 13*l.* 9*s.*

Under a joint and separate fiat the bankrupt's allowance is to be calculated on the amount of his separate estate, together with his share of the joint estate, not on the gross amount of the joint estate.

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The petition prayed that it might be declared, that the statutable allowance to which the petitioner was entitled ought to be calculated on the whole amount of the net proceeds of the joint estate of the petitioner and *Cooke*, and of the separate estate of the petitioner.

Mr. *Ching*, with whom was Mr. *Hetherington*, for the petition:—

The decision of the commissioner is erroneous, as it goes on the supposition that the petitioner is entitled to an allowance of 10*l.* per cent. on one moiety only of the net proceeds of the joint assets of the petitioner and *Cooke*, whereas he ought to have made such allowance on the full amount of the net proceeds of the joint estate, as well as of the separate estate of the petitioner. The allowance then would have amounted to 74*l.* 9*s.* 6*d.*, instead of the sum of 37*l.* 18*s.* 3*d.* The sections of 6 Geo. 4, c. 16, applicable to the present question are the 128th and 129th. The 128th enacts, “that every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission 10*s.* in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees; provided,” &c. And the 129th enacts, “that in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance.”

It is submitted, that this case is governed by *ex parte Minchin*, Mont. & Mac. 138, *ex parte Gibbs*, Mont. 105, and *ex parte Morris*, Mont. 505. *Ex parte Minchin* decided, that each partner was entitled to a full allowance, if a sufficient amount of dividend were paid; this

was followed by Lord *Lyndhurst* in *ex parte Gibbs*, who at first was inclined to differ from the Vice-Chancellor's decision in *ex parte Minchin*, but after consideration his Lordship concurred, saying, "When this case was last before me, I thought that there was but one allowance among all the bankrupts; but I have looked at the words of the act, and they are so precise and strong, that whatever may be my opinion of what was the intention of the legislature, still I think each party entitled to his allowance. The consequence is, that were there a partnership of forty persons, the amount of allowance would be enormous. But the words are so strong, I cannot get over them." And in *ex parte Morris* this Court said, "Each bankrupt is entitled to his allowance, provided there be a sufficient dividend on both estates, without regard to the estate from which the funds are supplied."

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Mr. *Swanston*, *contra* : —

This question never before arose. It certainly did not in the cases cited. In *ex parte Gibbs*, *Mont.* 105, the joint estate paid 20s. in the pound; 20s. in the pound was also paid on each separate estate, so that the full per-centage on both joint and separate estates together would not exceed that to which they would have been entitled under each of their separate estates. It is most material to notice the distinction between the wording of the 5 Geo. 3, c. 30, s. 7, and the 6 Geo. 4, c. 16, s. 128. The 5 Geo. 3. enacts, "that all and every person and persons so become or to become bankrupts, &c. shall be allowed the sum of 5*l.* per centum out of the net produce of all the estate that shall be recovered in," &c. The 6 Geo. 4. enacts, "that every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who

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have proved under the commission 10*s.* in the pound, shall be allowed five per cent. out of such produce," &c. This latter speaks of "his estate." Of what does "his estate" consist under a joint and separate commission? Undoubtedly of his separate estate, and his share of the joint estate.

[*Sir John Cross* : — If so, a bankrupt partner is not entitled to have any allowance on a joint commission till each moiety of the joint estate have paid 10*s.* in the pound, that is 20*s.* altogether; so that in *ex parte Gibbs*, though the joint creditors were paid 20*s.* in the pound, if there had been more than two partners, then, as neither would have contributed 10*s.* in the pound, they would not have been entitled to any allowance.]

In *ex parte Bate*, 1 Bro. 453, Lord *Thurlow* decided, that but one allowance was payable, and this decision the Vice-Chancellor held binding in *ex parte Powell*, 1 Mad. 70. (a) The right to allowance depends on section 128, to which it is necessary to refer back from section 129. Suppose section 128 were expunged, what right to allowance would exist under section 129 alone? That section neither extends nor contracts the allowance, it merely refers to the case of one partner procuring his certificate, while another does not. The consequences of allowing each partner a full allowance, calculated on the collective shares of his own and partner's proportions would be monstrous. Suppose a capitalist, one of a firm of twenty, and his estate to constitute all the assets, and to pay 10*s.* in the pound, and leave 5,000*l.*, is every farthing of that to be swept away by persons who did not contribute any thing to the estate?

(a) But, as was observed by the Vice-Chancellor in *ex parte Minchin, Mont. & Mac.* 141, the words of 6 Geo. 4, c. 16, differ materially from those of 5 Geo. 2, c. 30, s. 7, on which Lord *Thurlow's* decision in *ex parte Bate* was founded.

Mr. Ching in reply :—

The cases cited are endeavoured to be avoided, by saying, that in *ex parte Gibbs, Mont.* 105, the estates were so large as to render it immaterial how the calculation was made; but Lord *Lyndhurst* said, “ I think each party entitled to his allowance. The consequence is, that were there a partnership of forty persons the amount of allowance would be enormous. But the words are so strong I cannot get over them.” This was said after deliberation, and the prayer of this petition cannot be refused without over-ruling that opinion. Lord *Lyndhurst* says, each is entitled to his allowance, but the construction contended for would only give to each bankrupt half his allowance. What is the estate? That out of which the dividend is paid, and out of which the allowance is to come. As the creditors are not paid half dividends, why then is the bankrupt to be paid half allowance? The consequences of granting the prayer of this petition may be monstrous, as has been argued; but Lord *Lyndhurst* saw these “ monstrous ” consequences, and said he could not avoid them.

If the construction contended for be correct, an account must be taken between partners, in order to ascertain the proportions in which they are interested.

The CHIEF JUDGE :—

It at present appears to me that Mr. Commissioner *Fane* is correct in his interpretation of the statute, and that his decision does not impugn that in *ex parte Gibbs, Mont.* 105. But, as the matter is one of general importance, the Court will take time to consider before delivering final judgment.

At present, however, my view is as follows :— Considering section 128 alone, it appears to contemplate the trader either as sole or with a partner. If alone,

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no question can arise; if with a partner, I do not see that any doubt could exist, because "his estate" would consist of his own separate funds, and any surplus coming over to him after payment of the joint creditors. But then the act contemplates the existence of the joint commission, and interfered in section 129; so that though the separate estate may pay, yet if the joint do not, the surplus must first be carried over to the joint estate. For this purpose, and also to provide for the case of the certificate, the 129th section was framed. The questions are: 1st, Is this a joint commission? It is. 2d, Has the petitioner his certificate? He has. 3d, Has a sufficient dividend been paid on the joint estate? Here arises the question, What is a sufficient dividend? The answer is, that mentioned in section 128. The petitioner contends his allowance is to be 10*l.* per cent., calculated on the whole joint and separate estate, provided it do not exceed 600*l.* It appears to me that such was not the intent of the legislature: the fair construction of the act is, that the bankrupt's allowance should be calculated on the amount of his separate estate, and on his proportion of the joint estate, which latter he would not be entitled to but for section 129. *Ex parte Gibbs, Mont.* 105, only decides that the maximum of 600*l.* means the maximum which each shall receive, and not one aggregate of 600*l.* to be afterwards divided between the partners. The dictum of Lord *Lyndhurst*, "that were there a partnership of forty persons the amount of allowance would be enormous," has not the weight which has been attributed to it, because the supposed case of forty bankrupt partners may be met by supposing an estate proportionately larger.

Sir *John Cross*: — I am desirous of suspending my judgment for a short time. The course pursued by

the commissioner is entirely new. It appears difficult to declare that "his estate" means an estate composed partly of his own monies and partly of those of other persons.

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Sir *George Rose*:—Subject to the opinion of my learned colleague, and unless his opinion should differ from and turn mine, I do not think this is a question which should be left in doubt. I am at present of opinion that the decision of the commissioner is right, and must stand. Looking through the 6 Geo. 4. c. 16. no mention is to be found of a joint estate. (a) The orders of the Court touching the administration of joint estates were founded on an equitable power, possessed or assumed by the Court. Thus, when a joint partner proves by leave of the Court against the separate estate, he is restrained from receiving dividends till all the separate creditors are paid. Section 128 refers to separate estate alone; and though a commission may be joint, yet under that section the bankrupt would only be entitled to an allowance out of his separate estate. Then comes section 129, providing for a particular case, viz. that if there be two partners, and one do not obtain his certificate, that shall not be any bar to prevent the other obtaining an allowance, and that is all the section does. But as in that clause the words are used, "if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner," an idea has thence arisen, that he is to have an allowance calculated on the whole joint estate. Then arises the question, is a bankrupt to have in effect two allowances? It is said *ex parte Minchin, Mont. & Mac.* 138, decides that he is. I should hesitate long before I said or did

(a) See 2 *Christian*, B. L. page 17, edit. 2d.

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any thing in opposition to a judgment of Lord *Lyndhurst*; but neither the decision in *ex parte Minchin*, the words of Lord *Lyndhurst*, nor the equity of the act, lead to the conclusion that each partner is entitled to the full allowance as asked in the case now before the Court. No doubt a bankrupt is entitled to allowance out of the separate estate and out of the joint estate; but the question is, whether the allowance out of the joint estate is to be regulated by the amount of the estate itself, or by the amount of the bankrupt's share thereof? and I am at present of opinion that the latter is the proper construction to put on the words of the act.

Cur. ad. vult.

12th June. The CHIEF JUDGE:—

In this case there had been a joint commission against the petitioner *Lomas* and his partner *Cooke*, under which they were both declared bankrupts. The net produce of the joint estate amounted to 731*l.* 7*s.* 4*d.*, and the net produce of the separate estate of *Lomas* to 13*l.* 9*s.*, which latter sum, there being no debt proved against the separate estate of *Lomas*, had been carried over to the joint estate, making an aggregate of 744*l.* 16*s.* 4*d.*, and of which dividends to the amount of 14*s.* 6*d.* in the pound had been paid to all the joint creditors, leaving in the hands of the assignees the sum of 215*l.*

Upon the application of *Lomas* a reference was made to the commissioners to ascertain his statutable allowance under the commission; and the commissioner thereupon certified, that it appearing to him that not more than one moiety of the joint estate could be deemed to have been the estate of the petitioner within the meaning of the expression "his estate," contained in section 128 of 6 Geo. 4. c. 16. he had given the

petitioner credit for 365*l.* 13*s.* 6*d.* as the net produce of part of his estate, and that it being admitted before him that the separate estate of the petitioner amounted to 13*l.* 9*s.*, and that there being no separate creditor of the petitioner, such sum was carried over to the credit of the joint estate, he, the commissioner, had given the petitioner credit for the further sum of 13*l.* 9*s.*, as the net produce of the other part of his estate, and ascertained his statutable allowance to be the sum of 37*l.* 18*s.* 3*d.*, being 10*l.* per cent. upon 379*l.* 2*s.* 8*d.*, the amount of the two sums of 365*l.* 13*s.* 8*d.* and 13*l.* 9*s.* The bankrupt *Lomas* objected to this mode of calculating his allowance, and insisted that, according to the statute, he was entitled to 10*l.* per cent. on the whole sum of 744*l.* 16*s.* 4*d.*, being the aggregate of the net produce of the joint estate and of his separate estate, and presented a petition to this Court, praying that he might be declared entitled to such allowance.

Upon the argument great reliance was placed by the counsel for the petitioner on the decision of Lord *Lyndhurst* in *ex parte Gibbs*, *Mont.* 105, confirming the decision of the Vice-Chancellor in *ex parte Minchin*, *Mont. & Mac.* 135; and upon the case of *ex parte Morris*, *Mont.* 505, S. C. 1 *Dea. & Ch.* 526: I thought at the time that Mr. Commissioner *Fane*'s judgment was correct, and that the claim of the petitioner was not supported by the cases relied on. But, as the point was new, and as the decision would form a precedent in similar cases, and as my learned colleague Sir *John Cross* had not arrived at the same conclusion, it was thought desirable that the petition should stand over for the final judgment of the Court.

I have since carefully examined the cases cited, and all the other authorities bearing on the point, and I still retain the opinion which I then expressed; and I am

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glad to have that opinion further confirmed by the concurrence of Sir *John Cross* in the view taken by the rest of the Court at the argument.

If this question had arisen under the 5 Geo. 2. c. 30. s. 7. as qualified by the statute 3 Geo. 4. c. 81. s. 12. it might have been difficult to avoid the conclusion which the petitioner seeks to establish, owing to the peculiar wording of the first of those statutes.

It having been decided in *ex parte Bate*, 1 Bro. 453, and *ex parte Powell*, 1 Mad. 70, that the allowance to bankrupts under a joint commission was joint and entire, and therefore that only one allowance was to be given amongst them if all were entitled, and that if all were not entitled none could receive any portion of it, it was felt to be a great grievance that a bankrupt under a joint commission could never get the sum specified in the statute as the maximum of his allowance, however productive his estate might have been; and in many cases he was deprived of all allowance, by the misconduct of his partners, after the dissolution of the bankruptcy.

To remedy this grievance, the 12th section of the 3 Geo. 4. c. 81. was introduced, which gave an allowance to each bankrupt under a joint commission when individually qualified to claim it, whether his partners were entitled to any or not; but it was still necessary to refer to the 5 Geo. 2. c. 30. to see what that allowance was to be, and there it would appear that each bankrupt was entitled to a per-centage on the net produce of all the estate that should be recovered in and received, which of course would include the whole of the joint estate; and under this clause the argument of this petitioner would have had the literal interpretation of the statute in his favour, although this conclusion, as I shall presently show, would be as unjust to the credi-

tors as the former rule was injurious to the bankrupt. But in framing the 128th and 129th sections of the 6 Geo. 4. the legislature has avoided this difficulty, and has adopted language which, in my opinion, has made the estate of each bankrupt the measure of his own allowance, and has enabled the Court to avoid the two extremes, either of giving too little to the bankrupt, or of taking too much from the creditors.

By the 128th section it is enacted, that every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees; provided, &c.

In looking at this section we may collect the object of the legislature to have been, in substance, that each bankrupt should have returned to him, out of his own estate, an allowance bearing a stated proportion to the dividends received by the creditors, limiting the amount of such allowance to certain specified sums. In the case of a separate commission, to which alone the language of the 128th section is strictly applicable, no difficulty could arise; for the decision of *ex parte Farlow*, 1 Rose, 421, having excluded the joint estate in such a case from the calculation altogether, the words "his estate" could only apply to the bankrupt's separate estate, and his share of the surplus of the joint estate, if any; and, if it had not been for the 129th section, the only way to apply the 128th section to the case of a joint commission would be by treating the former as the bankrupt's, and adopting the decisions of *ex parte Bate*, 1 Bro. 453, and *ex parte Pownell*, 1 Mad. 70, to the fullest extent; or, if the 129th section had merely declared each bankrupt under a joint commission entitled to his

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allowance, although his partner may not be entitled to any allowance, it would be difficult to avoid the other extreme contended for by the petitioner.

The difficulty in such cases of otherwise interpreting the 128th section was pointed out by Sir *John Cross* during the argument, inasmuch as that section identifies the estate from which the dividends are paid with the estate upon which the allowance is to be calculated. But the 129th section, as it now stands, removes all difficulty; for by that section it is enacted, that in all joint commissions under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partner or partners may not be entitled to any allowance.

In the 128th section the condition on which any allowance is made payable to any bankrupt is, if the net produce of his estate shall pay the creditors who have proved under the commission the specified dividend; whereas by the 129th section the condition on which the allowance is payable under a joint commission is, if a sufficient dividend shall have been paid on the joint estate, and on the separate estate of the partner applying; it therefore varies the condition on which an allowance shall be payable, but makes no alteration as to the fund out of which it is to be paid, or on which percentage is to be calculated. We must therefore look to the 129th section, to see if the bankrupt, under a joint commission, be entitled to his allowance; and we must then look to the 128th section, to see how much is to be paid to him; and there we find that he is to receive a per-centage upon the net produce of "his estate," not exceeding a specified amount. Then what

is the estate of each bankrupt under a joint commission? Is it any thing more than his separate estate, and his proportion of the joint estate of the firm?

Taking therefore the two sections in connexion with each other, I collect that it was the intention of the legislature to give to each bankrupt under a joint commission, when duly qualified, the full allowance of ten per cent., up to the amount specified on the net produce of his own estate, and that it was never intended to give to several a similar per-centage on the whole of the joint estate; and I find nothing in any of the cases to warrant the opposite conclusion.

In *ex parte Minchin*, *Mont. & Mac.* 138, and *ex parte Gibbs*, *Mont.* 105, it distinctly appears, that if each bankrupt had received the full sum specified in the statute, the aggregate amount would not have exceeded the single per-centage on the whole joint estate; and this fact is relied on by the counsel in *ex parte Minchin*, *Mont.* 105; and therefore in those cases no one of the bankrupts would receive more than the statutable per-centage on his own share of the estate; in other words, a per-centage on the net produce of his estate. And there is nothing in the case of *ex parte Morris*, *Mont.* 505, that at all interferes with the view I am now taking of the statute; for in that case the question was, not what was to be the measure of the bankrupt's allowance, but whether he were entitled to any, inasmuch as it appeared that the original joint estate was not sufficient to pay 10s. in the pound, and that the dividend to the joint creditors had been raised beyond their amount by the surplus of the separate estate of the two other bankrupts. But this Court decided that, according to the language of the 129th section, it was not material out of what fund the dividend upon the joint estate had been paid; but that if a sufficient dividend

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was paid upon the joint estate, and the separate estate of the partner applying, he was entitled to his allowance.

The point now in dispute could not arise in that case; for it appears by the report, 1 *Dea. & Ch.* 526, that the net produce of the joint estate was 45,620*l.*, and of the petitioner's separate estate 928*l.* 12*s.* 9*d.* Adding therefore one third of the joint estate to the separate estate, the petitioner's estate would be 16,000*l.* and upwards, the per-centage on which would more than cover the 500*l.* claimed for his allowance.

Neither the language of the statute, therefore, nor any of the authorities, are at variance with the opinion of the commissioner; and I have the greater pleasure in confirming his decision, because it appears to me to be the only view which gives a just and reasonable effect to the obvious purpose of the legislature.

To illustrate this, take the extreme case put by Lord *Lyndhurst* in *ex parte Gibbs*, *Mont.* 105, of forty members of a bankrupt firm, equally interested in the joint stock, and all of whom were entitled to an allowance. Suppose the joint assets to be 36,000*l.*, and the joint debts 40,000*l.*, and that dividends to the amount of 10*s.* in the pound had been paid, there would then be 16,000*l.* left in the hands of the assignees, which would be just sufficient to pay each bankrupt the full statutable allowance of 400*l.*, to which each would be entitled if the petitioner's claim be tenable.

In that case the creditors would get 20,000*l.*; the bankrupt 16,000*l.*: the creditors would receive one half of their debt; the bankrupt would get back ten twelfths of his estate, instead of one twentieth. On the other hand, if only one allowance were to be made to all, the creditors would get 17*s.* 6*d.* in the pound, and each bankrupt only an allowance of 15*l.*, that is, one sixteenth instead of one tenth of his own estate. Whereas, by

the line adopted by the commissioner in this case, each creditor would have 16s. in the pound, and each bankrupt would receive 90L., that is, one tenth of his own estate, according to the obvious intention of the statute.

But this might be more strikingly illustrated by taking a case in which the dividend upon the joint estate had been principally paid by the surplus of the separate estate of some of the partners, or while the separate estates of the others might, as in the case before us, be trifling in amount, though sufficient to entitle the bankrupt to an allowance. If each bankrupt were to be entitled to a per-centage on the whole estate out of which the dividend was paid, then those who had contributed little or nothing would not only receive as much as those who had paid all, but would receive back, not a proportion of their own estates, but a portion of the separate estates of their partners, to which neither in law nor in conscience they ever had any claim.

I entirely concur, therefore, in the view taken by Mr. Commissioner *Fane*, as equally consistent with the language of the statute, the intention of the legislature, the decisions on the subject, and sound practical good sense.

Sir John Cross : —

The only question is, whether the petitioner's allowance ought to be computed on the whole of the joint estate, or on his share of the joint estate.

The latter appears to me manifestly the more just and equitable mode of computation.

This, however, is not a question of equity, but a pure question of law, depending on the construction of an act of parliament; and I did not at first see how that view of the case could be reconciled with the terms of

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the statute. Upon further consideration, however, I think the law and the equity of the case are clearly reconcilable.

The 128th section is adapted to cases of single bankruptcy, and the 129th to joint bankruptcies; the former gives in detail all the *data* for the calculation both of the dividends and of the allowance dependent thereon in single bankruptcies; the latter clause, in more general terms, enacts, that in all joint commissions, before any one of several partners shall be entitled to an allowance, a sufficient dividend must be paid upon the joint estate, and also upon his separate estate, but without furnishing any *data* for calculation, or any word of reference to the preceding clause; nevertheless, it appears to me it must be understood to mean, in the several proportions before mentioned.

We find, then, that the dividend for this purpose is in express terms required to be computed on the joint estate, that is, upon the entire joint estate; but the allowance is tacitly left to be computed for each partner according to the mode before prescribed in the case of single bankruptcy, and that is, "on the net produce of his estate," which, in the case of a joint commission, consists of the whole of his separate estate, together with his share of the joint estate.

This appears to be the true construction of the act; and I am therefore of opinion, that the allowance already made to the petitioner has been correctly calculated. I think the cases cited in argument do not touch this question, which does not appear to have been ever before brought under the consideration of the Court.

Sir George Rose:—I have already expressed my opinion at the close of the argument. I concur in the judgment pronounced.

Per Curiam : — The petition must be dismissed, and with costs, for the bankrupt, having obtained his certificate, no longer retains any privilege as to costs.

Petition dismissed, with costs; the assignees to be at liberty to retain their costs out of the allowance.

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Ex parte SIMPSON and others, assignees. — In the matter of SUDELL.

C. of R.
June 5,
1834.

THIS was the petition of the assignees of *Henry Sudell*, praying for a rehearing of a petition heard the 15th of January 1833, and reported *Mont. & Bli.* 229, when an order for a proof was made, which the present petition sought to have expunged.

Ex parte Myers,
Mont. & Bli.
229, confirmed.

Lyne and Co. were the agents of *Henry Sudell*. A party accepted bills under the following document, given by *Henry Sudell* : " In consequence of your allowing Messrs. *Lyne* to draw on you to the extent of 12,000*l.*, I hereby guarantee to you that amount, it being understood that payment of these drafts is to be provided for by myself, or Messrs. *Lyne*, in direct discountable bills, fourteen days at least before they fall due," &c. Messrs. *Lyne* accordingly ac-

The petition set forth the presentation of the original petition (by *Ewart, Myers*, and Co.), on the 30th of December 1831, which original petition stated as follows: That prior to and since October 1823 the petitioners had carried on, in co-partnership, the business of brokers at Liverpool, under the firm of *Ewart, Myers*, and Co., and in London under the firm of *Ewart, Taylor*, and Co.: That, since October 1823, the petitioners had extensive dealings with *Henry Sudell*, formerly of Woodford Park near Blackburn, Lancaster, merchant, against whom a commission issued the 7th of August 1827; which dealings consisted partly of money lent and advanced by the petitioners said Liverpool firm, at the request and for the use and on account of the said *Henry Sudell*, on the balance whereof a sum of 7,845*l.* was due by *Henry Sudell* to the petitioners, and

accepted bills; *Henry Sudell* became bankrupt before some of the bills became due. *Held*, there was a debt proveable, the document being, not a guarantee, but an original undertaking. *Semle*, it would have been proveable if a mere guarantee.

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partly of monies lent and advanced, &c. by the petitioners said London firm, at the request of and under the following written guarantee by *Henry Sudell*, given to the petitioners in November 1823:

“ Woodford Park, 8th Nov. 1823.

“ Messrs. *Ewart, Myers*, and Co.

“ Gentlemen,

“ In consequence of your allowing Messrs. *William Lyne* and *Thomas Sudell* to draw upon you to the extent of 12,000*l.*, and your accepting three drafts accordingly, but so as for them not to have more than that sum running at one period, I hereby guarantee to you that amount, it being distinctly understood that payment of these drafts is to be provided for either by myself or Messrs. *William Lyne* and *Thomas Sudell*, in direct discountable bills, fourteen days at the least before they fall due, and I also guarantee the due payment of all remittances made to you by Messrs. *William Lyne* and *Thomas Sudell*. I cannot conclude this letter without expressing my thanks for your confidence, and with the hope that the arrangement will be mutually advantageous.

“ I remain, gentlemen, very respectfully,

“ your obedient servant,

“ HENRY SUDELL.”

That *Lyne* and *Sudell*, who were merchants and partners at Liverpool, did, from the date of such guarantee, (commencing with drafts dated 11th of November 1823, and ending with drafts dated the 4th of July 1827,) from time to time, draw bills of exchange on the petitioners London firm, at three months date, all of which bills the petitioners had paid on the faith of the guarantee, and that on the balance of such guarantee account a further sum of 6,161*l.* had, through the default of the said *Lyne* and *Sudell* in reimbursing the petitioners, become due to the petitioners by *Henry Sudell*: That on the 15th of July 1831 the petitioners tendered their

proof for 7,845*l.* and 6,161*l.* under the commission against *Henry Sudell*, but the commissioners rejected the proofs, without assigning any reason.

The present petition of re-hearing further stated the hearing of the original petition, when it was ordered that the petitioners should prove for 7,845*l.* and 6,161*l.* against the estate of *Henry Sudell*, and that the petitioners should be paid dividends on the amount of such proofs, &c., but not disturbing any dividend then already declared :

That *Myers* and Co., on the 10th June 1833, proved for 7,845*l.* and 6,161*l.*; and that dividends to the amount of 1,079*l.* had been paid thereon :

That the petitioners were advised that such decision was erroneous, and the petitioners were aggrieved thereby :

That various affidavits were filed in support and in opposition to the original petition :

That since the hearing of the original petition the present petitioners had discovered further evidence with respect to the said sum of 7,845*l.*, viz. that Messrs. *Ewart* and Co. not only made no report, and rendered no account of sales of the said goods to *Henry Sudell*, or to the petitioners, his assignees after his bankruptcy, but that Messrs. *Ewart* and Co. from time to time rendered accounts of such sales to *Lyne* and *Sudell*, and to the assignees of *Lyne* and *Sudell*, in the following form; viz.

“ Liverpool, Exchange Alley, 12th Nov. 1827.

“ Messrs. *William Lyne* and *Thomas Sudell*.

“ We have this day sold for you the under-mentioned cotton to *Joseph Hogson* and Son.

“ H. S. 20 Egyptians, per *Thomas*, at 75/8.

“ Payment, ten days and three months.

“ Yours respectfully,

“ For *Ewart, Myers*, and Co.,

“ B. BRADSHAW.”

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The petition prayed that the original petition might be re-heard, the order rescinded, and the original petition of *Myers* and Co. dismissed, and that the affidavits filed in support and in opposition to the original petition might be read upon the hearing of this petition, and that the proofs made might be expunged, and that the dividends received might be refunded.

Mr. Montagu and *Mr. Richards* for the petition: —

This is an application to prove for 6,161*l.* advanced on bills under a guarantee, and for 7,845*l.* for money lent.

As to the 6,161*l.*, the question is, whether those bills be proveable under the commission against *Henry Sudell*.

Considerable doubt has been entertained on this subject, both by the Court and by commissioners. In *ex parte Marshall*, ante, page 118 (a), some observations were made by both on the case now before the Court. At page 119, *Mr. Merivale*, when speaking of this case (*ex parte Myers*), says, this Court recently decided, "that a debt on a guarantee, which had not become absolute before the bankruptcy, is a debt proveable under the 56th section;" and, in another part of his judgment, he says, "*ex parte Myers*, where the question was represented (in support of the petitioner) to be, merely whether the surety had contracted 'a debt' payable on a contingency within the 56th section; and it was taken for granted that, previous to the statute, a debt on a guarantee, which had not become absolute before the bankruptcy, was not proveable, though (as it was agreed) the proof was prevented, not by the nature of the debt, as being a

(a) See an elaborate note on the case of *ex parte Marshall* by Mr. Commissioner *Fane*, Appendix.

guarantee, but because it was upon a contingency. And then, in answer to a question of one of the learned Judges (Sir *J. Cross*), ‘how could this be a debt, or capable of valuation before the deficiencies were known?’ the counsel for the petitioner is driven to a construction of the latter part of the section (which I consider to be wholly untenable), that a demand not proveable as a debt due on a contingency at the time of the bankruptcy might become proveable by the subsequent happening of the contingency.” Mr. *Holroyd* says (p. 142), “As to the case of *ex parte Myers*, the contract there was not to indemnify against contingent damages, but an absolute engagement by the bankrupt, that he (the bankrupt) or certain other persons (named) should provide for the payment of certain bills, to the extent of 12,000*l*.” When the case of *ex parte Marshall* was brought a second time before the Court of Review (*ante*, page 145), the counsel (Mr. *Swanston* and Mr. *Bethell*) said, “the late case of *ex parte Myers*, *Mont. & Bli. 229*, is conclusive in favour of the petitioner, it having there been decided, that a debt on a guarantee not absolute before the bankruptcy was nevertheless proveable as a contingent debt.” And the Chief Judge said, “It has been imagined that the decision in this case must shake either *ex parte Myers* (*a*) or *ex parte Thompson* (*b*), but it will not necessarily disturb either. In *ex parte Thompson* (*b*) there was no existing debt when the commission issued, but there was in *ex parte Myers* (*a*), *Sudell* being indebted on a bill, the payment of which depended on a contingency.” And Sir *George Rose* said (page 154), “As to *ex parte Myers* (*a*), there never was a doubt but that a debt on a guarantee depending on

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(*a*) *Mont. & Bli. 229*, S.C. 2 *Dea. & Ch. 251*.

(*b*) *Mont. & Bli. 219*.

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a contingency was proveable after the contingency had happened. Twenty cases have fallen within my own observation in which commissioners have admitted such proofs as on a species of assumpsit, viewing such cases as similar to those which must go to a jury to decide the amount. It is familiar law that an undertaking to replace bank stock constitutes a liability which enables a proof to be made whenever the amount or value of the liability can be ascertained." And the Chief Judge said (page 156), "As upon referring to the reports of *ex parte Myers (b)* it appears to me that I have gone further than the authorities upon closer examination will warrant, I wish to avail myself of the reservation of our final judgment on this petition, by pointing out more precisely the view I take of the question. In my judgment in *ex parte Myers (b)* I have not distinctly marked the distinction between contingent liabilities that may never become debts and contingent debts that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class, upon which no debt has arisen till after the bankruptcy, cannot be proved under the 56th section, but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy and before proof is tendered, may be admitted. The case of *ex parte Thompson (a)* is an example of the first class: the case of *ex parte Myers (b)* was decided as belonging to the second class. In the case of *ex parte Thompson (a)* there was no debt due from any one till after the bankruptcy; in *ex parte Myers (b)* a debt had been clearly contracted with the holders of the bills before the bankruptcy for a specific sum, which the bankrupt

(a) *Mont. & Bl.* 219.

(b) *Mont. & Bl.* 229.

had engaged to pay unless he should be released from his obligation by the drawers taking up the bills. Whether in deciding that case we sufficiently adverted to the distinction between guarantees for the repayment of monies actually advanced or goods sold and delivered to third parties before the bankruptcy, and guarantees for payment of securities current at the time, may perhaps be a fit subject for consideration whenever a similar case may arise. It is enough here to say no such point arises in this case." And Sir *George Rose* says (page 160), "An opinion appears to have prevailed that some discrepancy exists between *ex parte Thompson* (a) and *ex parte Myers*. (b) Those cases are completely reconcilable. The act speaks of a debt payable on a contingency; the first question therefore must be, whether any debt exists?"

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These observations prove the law to be so unsettled as to require a minute examination of the principle on which it is founded, and of the various decisions on the statute.

The 6 Geo. 4. c. 16. s. 56. being remedial, it is necessary to consider the evil existing before it passed. Prior to that act there were various provisions for the proof of debts not immediately payable, and which were incorporated in the 6 Geo. 4. c. 16., by section 51 of which act debts payable on a certain future day are proveable. By section 52, sureties liable for the payment of a sum certain which is paid after the bankruptcy are entitled to prove. These claims relate to debts payable on a day certain. Sections 53, 54, and 55, relate to demands which depend on contingency whether they will or not be debts, section 53, relating to bottomry and respondentia bonds, and sections 54

(a) *Mont. & Bli.* 219.

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and 55, to annuities. Previous to 1809, when the remedy respecting annuities was introduced by 49 Geo. 3. c. 121. s. 17., annuity creditors, whether secured by bond or by covenant, were not entitled to prove, unless the bond were forfeited before the bankruptcy. This state of the law was the subject of complaint by various Judges, particularly by Lord *Mansfield* in *Wylke v. Wilks*, *Doug.* 519.

In 1809 the legislature remedied this evil, by enacting, in the most general terms, — which are adopted in 6 Geo. 4. c. 16. — “that any annuity creditor of any bankrupt, by whatever assurance the same may be secured, &c. shall be entitled to prove for the value of such annuity,” &c. — 6 Geo. 4. c. 16. s. 54.

Considerable evil also existed respecting proofs under marriage settlements. The first case is *ex parte Caswell*, 1728, 2 *P. Wms.* 497, where the bond of a husband to the wife's trustees, payable in the event of his wife's surviving him, was adjudged not proveable. The Chancellor said, though the debt were contingent when the obligor became a bankrupt, yet if the contingency happened before the distribution made, then such contingent creditor should come in for his debt; so if such contingency happened before the second dividend made, the creditor should come in for his proportion thereof, though after the first dividend.

In *ex parte Greenaway*, 1 *Atk.* 113, a similar case, the husband actually died before the distribution made: the wife prayed to have a dividend; the Chancellor expressed his opinion of the hardship of the case, and intimated some doubts as to the law; the matter was compromised. The next case is *ex parte Groome*, A. D. 1744, 1 *Atk.* 115, and the next *ex parte Mitchell*, 1751, 1 *Atk.* 120; in which cases the Chancellor seems of opinion, that the trustees are entitled to a dividend. But in *ex parte*

Mitchell, in consequence of the hardship of the case, his Lordship recommended the assignees to compromise. In *ex parte Groome*, 1 *Atk.* 115, the Chancellor says, "There is no such thing as drawing a line between the contingency not happening before the bankruptcy, and yet happening before the time of distribution; this would not only be a hardship on the bankrupt, but on the rest of the creditors, whose debts were actually due; but would have given the contingent creditor a superior privilege, by leaving it open to him to recover the remainder of the debt against the bankrupt."

There was another species of debts, contingent only as to the time of payment, which were not proveable. In *ex parte Barker*, 9 *Ves.* 110, on the marriage of *Barker* with *Hannah Hornby*, *Joseph* and *William Hornby* gave their joint and several bond, conditioned to be void if, within three months after the decease of the obligors or the survivor, the executors should pay 1,000*l.*; and the debt was held not proveable.

There was also another species of contingent debts not proveable, viz. guarantees, where the surety became bankrupt before any liability attached on him, and where it was contingent whether any liability ever would attach on him; as, for instance, if *A.* were surety for payment of a bill accepted by Messrs. *Child* or Messrs. *Coutts*, and *A.* became bankrupt before the bill became due. To remedy this the legislature interfered, and by the 56th section of 6 *Geo.* 4, c. 16, enacted, "That if any bankrupt shall before the issuing of the commission have contracted any debt, payable on a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and

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admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividend with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

The question is, whether this interposition be as general as was the case as to annuities; whether it be confined to debts, or extend to damages?

There are two modes of trying this: 1st, By the statute itself; 2d, By the decided cases.

1st, *As to the statute.*

As the words are not general so as to include all liabilities, and as this 56th clause does not contain such extensive expressions as the annuity clause, viz. "*by whatever assurance the same be secured,*" it may safely be asserted that the provision was not intended to be general; if so, the word "liability" would have been used, as is stated in *ex parte Marshall, ante*, 130, where Mr. Commissioner *Fonblanque* says, "The 6 Geo. 4. no more lets in every kind of contingent debt, however uncertain in amount or chances, than the 7 Geo. 1. lets in policies of insurance, or 19 Geo. 2. lets in bail. If the discharge were to have been as ample as contended at the bar by the counsel for the claimant, the legislature might have made one short clause suffice for every purpose by adopting the word liability, instead of framing six different clauses, all differently worded according to the exigencies of their several occasions."

The question therefore is, to what species of demands the provision was intended to be confined? The important words are, 1st, "Shall have contracted any

debt;" the meaning of which seems clear to any lawyer, being a demand for which an action of debt—or *indebitatus assumpsit* when the event becomes absolute—may be maintained, but not for damages, whether recoverable in an action of covenant or special assumpsit; the meaning of the word "debt" cannot be misunderstood: and, 2d, "Payable on a contingency;" that is, when the happening, either of the event or the time, or both, is attended with uncertainty.

The contingency must not have happened at the time of the bankruptcy. That the statute did not include a debt for which an action might be maintained before the bankruptcy is obvious, because no interference of the legislature was necessary to render such debts proveable, and the express words of section 56 are, "the contingency shall not have happened before the issuing such commission." The meaning of this is, that there should be such a contract before the bankruptcy as would, upon the happening of the event, support an action for a sum certain.

The dividend under section 56 is payable *instantly*, contrary to the provision with respect to bottomry and respondentia bonds, the enactment as to which is (sect. 53), that the obligee "shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the commission against such obligor or insurer;" but the words of section 56 are, "the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon." It appears, therefore, that

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the law intended, not the uncertain claims dependent on damages, but those only which were strictly recoverable as debts.

2d, *As to the cases.*

As there have been no less than eighteen cases on the point, we now probably shall be able to establish some satisfactory general rule. The decisions may be distinguished into demands on which an action of debt might be maintained, as bonds, covenants for a sum certain, and judgments, and into demands on which the action is only for damages.

As to bonds. *Ex parte Grundy*, 1829, *Mont. & Mac.* 293, was the first; there the bankrupt had given a bond for the performance of the covenants in his marriage settlement, one of which was to pay 2,000*l.* if his wife or any of his children should survive him; in 1803 a commission issued against him, under which he obtained his certificate, and in 1825 he died, leaving issue; in 1828 a renewed commission was taken out, under which the 2,000*l.* was held proveable.

Ex parte Tindall, *Mont.* 375 & 462, was a covenant for payment of a sum certain depending on a contingency. The Chief Justice of the Common Pleas, in delivering the judgment of the Court, said, "We do not found our opinion upon the technical ground, that an action of debt will lie in point of form, but upon the substance and effect of an absolute covenant that a man's executor shall pay a sum of money to certain persons upon certain trusts, which in our opinion constitutes a debt."

It never has been adjudged that a debt under a marriage settlement, secured only by a covenant for unliquidated damages, is proveable, and unless the statute law be altered, never will. The next case is *ex parte Lewis*, *Mont. & Mac.* 420, by which it is decided that a

guarantee by bond is proveable; in the same manner as before the statute it was decided, that if a surety had received from the principal an instrument of indemnity, payable before the bankruptcy of the principal, it is proveable by the surety under the commission against the principal. (a) The next case on a bond is *ex parte Marshall*, ante, page 145, which may appear to be an exception, but there is no necessity, on the question now before the Court, to discuss whether *ex parte Marshall* be well decided or not; for supposing it to be law, as it determines that even a contingent liability secured by bond is not proveable, it follows *a fortiori* that when capable of being enforced by an action for damages only it must share the same fate. Such are the cases on bonds.

The next class of cases are on covenants, of which the first is *Attwood v. Partridge*, 4 Bing. 209, in which the defendant covenanted for the due payment by a debtor of the premium on a policy of insurance assigned to the creditor; this was decided not to be a debt contracted within the meaning of the 6 Geo. 4, c. 16, s. 56, but a demand for unliquidated damages.

The next case is *ex parte Thompson*, Mont. & Bl. 219, S. C. 2 Dea. & Ch. 126, which decided that a covenant by a surety for the payment of an annuity if the grantor do not, is not proveable, not being a debt contracted, but a demand recoverable only as damages: The Chief Judge said, "The only question therefore is, whether the petitioner is entitled to prove as a contingent debt under section 56. But to entitle him to

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(a) *Goddard v. Vanderheyden*, 373; *Crookshank v. Thompson*, 3 Wils. 270. But see *Touissant Str.* 1160; *Martin v. Court*, v. *Martinnant*, 2 Ter. Rep. 640; 2 T. R. 640; *Hodson v. Bell*, *ex parte Cookshot*, 3 Bro. 502. 7 T. R. 97; and *ex parte Beau*. See also *ex parte Walker*, 4 Ves. fuy, Cooke, 200.

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prove by virtue of this clause, it must be made out that this is a "debt" contracted by the bankrupt, payable upon a contingency; that he owed something at the issuing of the commission, although it depended upon a contingency whether it would become payable."

There have been two cases on judgments, *Johnson v. Compton*, 4 Sim. 37, and *Willman v. White*, 6 Bing. 291.

In *Johnson v. Compton*, *Compton* covenanted that in case S. (the grantor of an annuity) should not pay the annuity, and the premium on a policy of insurance, then he would pay, and he executed a warrant of attorney, on which judgment was entered up. *Compton* became bankrupt, and a question arose whether this debt would have been proveable under the commission. It was said in judgment, "*Compton* did not covenant to pay the annuity in all events, but only when the grantor made default; he therefore never undertook to pay the whole sum, and consequently his estate cannot be liable to that extent. This case does not fall within the 6 Geo. 4. c. 16., and the amount alleged to be due could not have been proved under 49 G. 3. c. 121. s. 17.; for *Compton* cannot, for the reasons which I have before adverted to, be considered as an annuity creditor of the plaintiff."

From that case it appears that the distinction depended on the difference between debt and covenant.

In *Wilmer v. White*, 6 Bing. 291, there was interlocutory judgment before the insolvency, which was held not to be sufficient to entitle a debt to be proved under the insolvent act.

The next class comprises cases on simple contract. In *Birè v. Moreau*, 4 Bing. 57, in July a verdict was found against the defendant; in August a commission issued against him; in Michaelmas Term he obtained his certificate; judgment was afterwards signed, and costs

taxed. It was contended that these costs constituted a contingent debt within section 56; to which it was answered, that section 56 applied only when a "debt" had been contracted, and costs were not a "debt," but a payment *in invitum*; and *Best*, C.J., said, "Although this is a hard case, I think the act does not apply. The costs for which the plaintiff is liable are not a debt contracted within the meaning of the 56th section." *Park*, J., said, "There is no contract between the parties in respect of these costs;" and *Burrough*, J., said, "These costs do not arise out of any contract on a contingency."

The next case is *Boorman v. Nash*, 9 *Barn. & Cres.* 152, in which a demand on a contract for goods, to be delivered on a future day, at a certain price, was held not barred by the certificate under a commission issued before the day arrived. It was adjudged not to have been proveable, because it was only unliquidated damages.

The next is *Yallop v. Ebers*, 1 *Barn. & Adol.* 700, which was an undertaking to pay the acceptor of a bill the amount of the acceptance, or to indemnify him. It was held not to be a contingent debt, but damages, and not proveable.

Such are the cases on the subject. In addition there are some dicta which ought to be noticed.

In *ex parte Marshall*, *ante*, page 151, the Chief Judge says, [as is stated, *ante*, page 546, beginning "as upon referring," and ending, "in this case."] After a careful examination of these words, and the exercise of that caution which is necessary when the structure of the sentence may mislead, there appears to be some difficulty in annexing a precise idea to them. Whether it be more than appearance is the question. It is said, first,

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that contingent liabilities that may never become debts are not proveable, as in *ex parte Thompson*. (a) If by this be meant a liability which never may become a debt, — and which never can until judgment have been obtained on the covenant, — the position is indisputable, and means only that when the demand is for damage it is not proveable within the act. It is said, secondly, that contingent debts that may never become payable are proveable, as in *ex parte Myers, Mont. & Bli.* 229. The general position explained by this dictum is, that the demand must be for a debt contracted, that is, a demand which can only be enforced by an action of debt, or *indebitatus assumpsit*. The next position is that in *ex parte Myers, Mont. & Bli.* 229, there is a debt; but this seems difficult to reconcile with the established law on the subject, which is, that the mode of enforcing a contract of guarantee is by special action on the case. *Anon.*, 1 *Vent.* 293; *Kent v. Derby*, 1 *Vent.* 311; *Roger v. Roger*, 2 *Vent.* 36; *Butcher v. Andrews*, 1 *Salk.* 28, *S. C. Carth.* 446; *Mernot v. Lister*, 2 *Wils.* 141; *Mines v. Smallthorpe*, 2 *Camp.* 215; and the declaration must, as in all other cases, sufficiently set out the consideration, the undertaking, and the breach. 1 *Saund.* 211, note 2; *Williams v. Leper*, 3 *Burr.* 1890; *Fell on Guarantees*, 158.

As, therefore, the only mode of enforcing the contract in the case now before the Court must be by special assumpsit, it seems difficult to understand the meaning of the explanation.

The CHIEF JUDGE: —

The distinction I there intended to draw is that

(a) *Mont. & Bli.* 219.

which is exemplified by the cases of *ex parte Thompson* (a) and *ex parte Tindall*. (b) In *ex parte Thompson* there was a contingent liability, which might never have become a debt. In *ex parte Tindall* there was a contingent debt, which might never become payable. In the case now before the Court upon *Myers, Ewart, and Co.* accepting the bills of *Lyne and Thomas Sudell, Henry Sudell*, by force of his contract, incurred a liability to indemnify the acceptors, and it depended upon the event of the acceptors being called upon to pay those bills, whether that liability would ever become a debt. Upon the argument of *ex parte Marshall, ante*, page 145, I was led to reconsider my former judgment in this case, and it then occurred to me that I had not sufficiently attended to this distinction, and had laid down the position too broadly; and as upon reference to my notes I could not clearly ascertain whether *Myers, Ewart, and Co.* had paid any of their acceptances before the bankruptcies, or whether they had been provided for at maturity by *Lyne and Sudell*, I made the observation referred to in the latter part of the passage now alluded to; for if they had not actually paid any of their acceptances before the bankruptcy of *Henry Sudell*, he would have contracted a liability but no debt; whereas if they had paid their first acceptances a debt would have been thereupon contracted by *Henry Sudell*, though not payable at all events till the substituted bills became due, and then payable by him only upon the contingency of *Lyne and Thomas Sudell* not providing for the substituted bills. It is now admitted that acceptances to the amount of the debts claimed had been paid by *Myers, Ewart, and Co.* before the bankruptcy of *Henry Sudell*, and that the bills running at the time of his bankruptcy were

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renewed or substituted bills, which they were obliged to pay, and had paid before the tender of their proof. This fact, therefore, relieves the case from the difficulty suggested by me in *ex parte Marshall, ante*, page 145.

Mr. *Montagu* and Mr. *Richards* : —

Such are the decisions and dicta on the subject, from which, and the words of the statute, it follows, that every species of liability is not intended to be included, and that the operation of the statute is and was intended to be confined to “debts” within the strict legal meaning of the word. If every species of guarantee for the payment of the debt of another were proveable, the commissioners would be bound to ascertain the value of the contingency, that is, the probability whether an acceptor — *Coutts, Drummonds, or Childs* for instance — would pay their acceptances. And to enable them to ascertain this with any correctness, they would be entitled to summon the acceptor, and to examine into the state of his circumstances, whether solvent or insolvent; a power which it can never be supposed the legislature could intend to give on a dispute respecting the proof of a debt; a power which, from the impossibility of executing it, by the contingency not being capable of valuation, would be inoperative, as when the demand cannot be estimated, it cannot be proved. *Ex parte Eagle, Mont. & Mac.* 422.

But it is said, that when the event occurs after the bankruptcy the difficulty is removed, and the problem is solved. The words of the Chief Judge are, (*ex parte Marshall, ante*, 156,) “all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy, and before proof is tendered, may be admitted.”

But it is submitted that this is a mistake as to the true meaning of the clause: the words are, "The person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends."

The object of this provision was, not to suffer the right of the creditor to be varied by any event after the bankruptcy, but to permit him, if he rely on his own judgment as to the value of the contingency at the time of the bankruptcy, to wait until the event have happened, which he foresees will happen. If the event be incapable of valuation at the time of the bankruptcy, it is not proveable. Could it be contended, that if the event were, as in *ex parte Eagle, Mont. & Mac.* 422, whether a widow would marry again, and therefore not capable of valuation, that on her marriage it would then become proveable? The right must exist at the time of the bankruptcy, although, in favour of the creditor, there is a right to defer the proof until the event have happened, subject to the loss he may sustain by a previous division of the assets having taken place.

The former decision went on an assumption of the fact, that credit was given to *Henry Sudell*, and not to *Lyne and Sudell*, that is disputed. The rule of law is, if parties deal with an agent, knowing he had a principal, they cannot afterwards make the principal responsible; but if they were ignorant of that fact they can.

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In this case the parties indisputably knew that *Lyne* and *Sudell* were acting as agents; the credit in the books is given to *Lyne* and *Sudell*, and there is not a single entry in any of the books in which *Henry Sudell* is charged. All the notes were made out to *Lyne* and *Sudell*. If credit had been intended to have been given to *Henry Sudell*, why was he not party to the bills?

If *Ewart* and Co. were dealing with *Henry Sudell*, why did he give the guarantee in question? When was it ever known that a man gives a guarantee for payment of his own debt? [The CHIEF JUDGE:— Might not the paper have been given to shew the amount for which he had authorized his agents to draw?] The 56th section says, a “debt” shall be proveable, though its payment depend on a contingency: was there a “debt” in this case? *Henry Sudell* was a surety, and his principal had not made default when the commission issued, and consequently there was no debt proveable, *ex parte Thompson, Mont. & Bli.* 219. The distinction is excellently laid down in *ex parte Myers, Mont. & Bli.*, 229, where the Chief Judge says, “to constitute a debt payable upon a contingency there must be a debt contracted, and not a mere liability.” If *Henry Sudell* had been liable as a principal no necessity existed for his guarantee; his name might at once have been added to the bills; and the guarantee was mere supererogation. That this instrument is a guarantee is clear: its words are, “I hereby guarantee you that amount.” If it had been “I undertake,” or “I will pay,” that might have made him a principal; but when a mercantile man uses the word “guarantee,” he uses a word well understood among merchants, as making the person using it a surety; and the consequences would be alarming if “I guarantee” were read “I undertake.” “Guarantee” has a technical signification, and implies suretyship, and

the failure of a principal, as was decided in *ex parte Thompson*, *Mont. & Bl.* 228. It was decided in *Clements v. Langley*, 2 *Nev. & Mann.* 269, that the certificate is no bar to an action for contribution. In that case *Denman*, C. J., said, "There was here no debt capable of valuation in order to its being proved, because two contingencies were to be taken into consideration; first, whether the original debtor would not himself pay the debt, and second, whether the defendant would ever be called on to pay it." (a)

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Mr. *Kindersley*, for the respondents, was stopped by the Court.

THE CHIEF JUDGE:—

If the very learned and able argument of the counsel for the petitioner had led me to doubt the correctness of our former decision in this case, I should not hesitate to acknowledge it, and I should have forborne the expression of any further opinion, until the close of the arguments on both sides should have furnished the fullest opportunity for forming a definitive judgment upon the points in discussion. But it being admitted that *Myers*, *Ewart*, and Co. had, before the bankruptcy of *Henry Sudell*, paid bills, which they had accepted upon the faith of his engagement, to a larger amount than the balance now claimed, I am of opinion, that even if the documents under which *Henry Sudell* became liable be considered as a guarantee in the strict sense of the word, the debt in question would be proveable under his commission. But I think that instrument may be properly taken in the light in which it was viewed by His Honor

(a) In *Clements v. Langley*, the case of *ex parte Myers*, *Mont. & Bl.* 229, was cited in argument in support of the contrary doctrine.

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Sir *John Cross*, as an original undertaking by *Henry Sudell* to pay, to the amount specified, bills drawn by his agents *Lyne* and *Thomas Sudell*, upon *Myers, Ewart, and Co.*; and if so, no question arises under the 56th section of the Bankrupt Act, for the moment *Myers, Ewart, and Co.* paid any bills accepted by them on the faith of this undertaking, an absolute debt, to the amount of such payment, was incurred by *Henry Sudell*, which would continue to exist until satisfied by payment of the substituted bills. But I am further of opinion, that if *Lyne* and *Thomas Sudell* be considered as the principal debtors, and the undertaking by *Henry Sudell* be construed as a mere guarantee, the balance left unpaid at the date of his commission would constitute a debt proveable under the 56th section of the 6 Geo. 4, c. 16.

It is true that, upon the original acceptance of the bills by *Myers, Ewart, and Co.*, nothing more than a mere liability to indemnify, and not a debt, would have been contracted, either by *Lyne* and *Thomas Sudell*, or by *Henry Sudell*; but when those acceptances were, at maturity, paid by *Myers, Ewart, and Co.*, the amount would be so much money paid by them to the use of *Lyne* and *Thomas Sudell*, raising an absolute debt due from them, and at the same time creating a contingent debt, payable by *Henry Sudell* upon the failure of *Lyne* and *Thomas Sudell* to provide for the substituted bills, according to the agreement between the parties; consequently, at the time of his bankruptcy, *Henry Sudell* contracted a debt payable upon a contingency which had not then happened, the substituted bills having, at the issuing of the commission, more than fourteen days to run. If the proof had been tendered before those bills became due, the right to prove would have depended on the question, whether the debt were then capable of valuation. But when the proof was tendered and re-

jected, the bills had become due and had been paid by *Myers, Ewart, and Co.*, and therefore the contingency on which the payment of the debts contracted by *Henry Sudell* was to depend, had happened, and the debt which had been contingent at the date of the commission had since become absolute, and was therefore, in my opinion, proveable under the commission. It has, however, been pressed in argument, that admitting there were a debt contracted, yet as it was incapable of valuation at the date of the commission, it was not and is not now proveable. But I do not understand that the second part of the 56th section is necessarily confined to cases that might have been brought within the first branch of the clause, and I can perceive no reason why the second branch should not apply to cases where the contingency has happened since the commission issued, although the debts, from the nature of the contingency, might have been incapable of valuation until the event had occurred. In *ex parte Thompson, Mont. & Bli.* 228, I am reported to have said, that to constitute a debt payable on a contingency within the 56th section, it must be a debt capable *a priori* of valuation. I rather think the observation fell from one of my learned colleagues, certainly not from me; for my opinion has always been, that where the contingency, on which the payment of a debt depends, happens before the declaration of a final dividend, and before the bankrupt has obtained his certificate, the creditor may and is bound under the latter branch of the 56th section to come in and prove his debt under the commission, although at the date of the commission the debt was incapable of valuation. I am not aware that this view of the question contravenes any decided case, and it seems to me in unison with the general intent of the legislature, as manifested throughout the statute; on the one hand, to give every person to whom the bank-

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rupt was indebted a right to a share in his estate, and on the other hand, to relieve the bankrupt who honestly gives up all his property to his creditors from all debts which can be appreciated before that property is distributed. Upon this part of the case, therefore, I am of opinion, that, whether *Henry Sudell* be considered as the principal, or as a surety only, there exists a debt to *Myers, Ewart, and Co.* proveable under his commission.

The other question in this case with respect to the proof for 850*l.* is one of fact merely; that is, whether credit were given to *Henry Sudell* or to *Lyne and Thomas Sudell*. Upon the former discussion the Court thought, after a review of all the circumstances of the case, that the credit had been given to *Henry Sudell*; and there is nothing in the facts now added that leads my mind to a different conclusion.

It is true that *Myers, Ewart, and Co.* had something beyond mere personal security for the monies advanced, namely, the deposit and pledge of goods; but it does not follow that they did not intend to look to the owner of the goods for payment, if the proceeds of the sale should eventually prove insufficient. But it has been urged, that the circumstance of the accounts in the books of *Lyne and Thomas Sudell* being kept with *Myers, Ewart, and Co.*, and of the accounts of *Myers, Ewart, and Co.* being kept with *Lyne and Thomas Sudell*, and not with *Henry Sudell*, furnishes satisfactory proof that *Lyne and Thomas Sudell* were the parties responsible for any deficiency. It is undoubtedly a circumstance worthy of attention, but not sufficient, I think, to counterbalance the other evidence in the case. In the first place, *Lyne and Thomas Sudell* acted throughout avowedly as the agents of *Henry Sudell*. The money was advanced for the accommodation of

Henry Sudell; *Lyne* and *Sudell* nowhere appear to have directly pledged their personal responsibility. In their letters to *Myers, Ewart, and Co.*, they speak of the money as advanced to *Henry Sudell, through them*; and *Myers, Ewart, and Co.* speak of the advances to them *on his account*; and in the several notes from *Henry Sudell* which accompanied each pledge of the goods, he speaks of the monies which *Myers, Ewart, and Co.* should "advance" or "pay" to *Lyne* and *Thomas Sudell*, and not which they should lend. If the latter expression had been adopted, it might have implied that the money was to be advanced on the credit of *Lyne* and *Thomas Sudell*, and that the goods were merely pledged as a collateral security; but the language used by all parties is perfectly consistent with the view taken of this question by the Court upon the former hearing; and the manner of keeping the accounts seems to have been adopted for the purpose of keeping their transactions quite distinct from the other dealings in which *Henry Sudell* was at that time engaged. I am therefore of opinion that the former decision of this Court was correct, and that this petition must be dismissed with costs.

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Sir John Cross : —

I regret there is no fixed period within which parties are limited in applying for a re-hearing. In this case more than a year has elapsed since judgment was given. To allow a re-hearing after so long a time is contrary to the practice pursued in courts of common law, where a new trial must be moved for within the first four days of the term next after verdict.

The time for
rehearing ought
to be limited.

1st, The question whether the 7,000*l.* is proveable is one of fact. On the former hearing the Court decided the proof ought to be admitted; and the question now

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is, whether the parties asking a re-hearing have shewn that the Court came before to a wrong conclusion. I think we did not; consequently I adhere to my former opinion as to this debt.

2d, As to the guarantee. I have always thought it a question of extreme nicety whether guarantees were within the 56th section; and if the paper in question were a mere guarantee for the debt of another, I am not prepared to say what my decision would be. On that question it is unnecessary to give any opinion on the present occasion.

Lyne and *Sudell* were the agents of *Henry Sudell*, and lived in the same place with *Ewart* and Co., dealing with them as agents only. *Henry Sudell* being desirous of obtaining the respectable name of *Ewart* and Co. to his bills, applied to *Ewart* and Co. to accept bills drawn by *Lyne* and *Sudell*, and, as an inducement, gave what is termed the guarantee in question. The meaning of this paper, as it seems to me, is, "if you accept bills for my agents, do not send them to me for indorsement, for I undertake that, within fourteen days before they become due, either I or my agents shall provide you with funds for their due payment;" or, in other words, "if you will pay my agent's bills, which for divers reasons I do not like to indorse myself, I will take care to provide funds for their due payment."

The word "guarantee" made use of in the letter is certainly not so appropriate as "undertake" would have been; but the real meaning of the word used, when we advert to the relation of the parties, cannot be misunderstood.

My opinion therefore is, that *Henry Sudell* was a principal, undertaking to provide for the payment of these bills, not only when they became due, but fourteen days before, and that consequently there is no founda-

tion for this petition of re-hearing as regards this debt; and therefore I think it should be dismissed with costs.

Sir George Rose: —

The counsel for the petitioners have thought this a proper case for a re-hearing; my consideration for their opinion alone induces me to think it necessary to make any observations.

In *ex parte Myers* (a) I said, that “ I never knew it doubted that a debt on a guarantee, when the contingency had happened, could be proved, and that I recollected fifty of such cases.”

I now repeat, after consideration, that where a guarantee becomes absolute before the bankruptcy, and was capable of valuation, the practice always has been to consider it proveable. This practice, having been adopted during so long a period without adverse applications, proves the general impression as to the existence of the rule.

To a certain extent it may be laid down as a rule, that so far as guarantees are concerned, a debt proveable and a petitioning creditor's debt are convertible terms.

That Lord *Eldon* did not supersede in the case of the guarantee (b) is a strong authority, as proving his Lordship was of opinion that it would support the commission.

The meaning of the word “ guarantee,” when used in any writing, is to be ascertained from the nature of the instrument, and of the transaction in each particular

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(a) *Mont. & Bli.* 241.

my knowledge, deterred by the

(b) *Ex parte Stead*, 1 G. & J. 301. Note: The parties were, to

expendence from trying the question. B. M.

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case ; and its being used is not conclusive as to whether the party using it be or be not a mere surety.

The undertaking in this case is a direct contract of debt. There is a circumstance, no doubt, as to the mode of payment ; but that no further affects the contract than as shewing how the money is to be paid.

Let it be assumed that the document in question was a mere guarantee to be answerable for the debt of another, if that other did not pay ; and suppose,

1st, That the contingency happened before bankruptcy.

2d, It happened after.

1st, If the contingency had occurred before the bankruptcy there could have been no difficulty ; for the circumstances which had already happened shewed *Lyne* and *Sudell* to be so completely insolvent as would prove to any commissioner that they were utterly disabled from ever paying.

2d, If the contingency were after the bankruptcy. If any doubt arise whether it then would be proveable, the 135th section of the bankrupt act gives the creditors the benefit of that doubt ; and certainly the construction made in this case is favourable to the creditors.

The general and leading intent of the bankrupt statutes is, first, legally to distribute the assets ; and, second, to release the bankrupt from all demands which depriving him of his property has disabled him from meeting.

The 121st section of 6 Geo. 4, c. 16, enacts, “ that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made proveable under the commission,

in case he shall obtain a certificate," &c. This section not only mentions "all debts due," but "all claims and demands hereby made proveable." What can this mean, but that some liabilities are proveable, though not strictly "debts," and though an action of "debt" would not lie at the time of the bankruptcy?

There are many engagements to pay money, as for the value of goods, which before the bankruptcy would not have been the subject of an action of "debt," but for which an action of assumpsit must have been brought; yet if the only reason of the necessity for the action of assumpsit, instead of debt, was that the amount was not ascertained, and the commissioners could ascertain that amount, it would constitute a debt proveable.

I must not, however, be understood to lay down a general rule that all guarantees are proveable; such is not the law.

I concur that this petition of re-hearing must be dismissed with costs.

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Fauntleroy, a partner in a banking-house, transferred bank stock, belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by *Fauntleroy*, who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence would have known of it. *Quære*, Whether the customer can prove for the value of the stock under the commission?

— An action ordered to try whether the partners were indebted to the customer.

— See *Keating v. Marsh*, *post*, 582, and *Marsh v. Keating*, *post*, 592.

THIS was a petition by the assignees under the commission against *Marsh* and Co.

The petition stated, that *Ann Keating* was admitted to prove for 6,013*l.*, for so much money had and received by the bankrupts for the use of *Ann Keating*.

That such proof ought not to have been admitted, because the deposition of debt was defective, and the debt not proveable.

That the deposition of debt was as follows: — “ *Ann Keating* maketh oath and saith, that in or about the year 1819 she was possessed of 9,000*l.* three per cent. reduced bank annuities, standing in her name in the books of the Bank of England, and that the bankrupts were her bankers, and, as such, held a power of attorney from her to receive the dividends on the said stock, and which were received by them, and carried to her credit every half year; and deponent is informed and believes, from the result of searches and enquiries made by her solicitor for that purpose, that, on or about the 29th day of December 1819, a contract was made by one *J. B. Simpson*, as the broker for the bankrupts, for the sale of the 9,000*l.* three per cent. reduced bank annuities for 6,013*l.*; and that *Henry Fauntleroy*, one of the bankrupts, attended at the bank, purporting to be authorized by deponent under a power of attorney, pretended to have been executed by deponent for that purpose; and, in pursuance of such contract, executed an instrument for the transfer of the said 9,000*l.* three

per cent. reduced annuities, by or in the name of this deponent, whereby deponent ceased to have credit for the said sum of 9,000*l.* in the books of the Bank of England; and that she is also informed and believes, from the result of such searches and enquiries as aforesaid, that the said sum of 6,013*l.* (being the money produced by the sale of the said stock, after deducting the brokerage thereon) was paid to the account of the bankrupts, at Messrs. *Martins, Stone, and Co.*, bankers; and that, from the date of such transfer, up to the month of April 1824 inclusive, the house of *Marsh, Stracey, and Co.* continued to credit deponent every half year for a sum of money equivalent to the half-yearly dividends, which would have accrued due on the said sum of 9,000*l.* three per cent. reduced annuities, if the same had not been sold and transferred as aforesaid; and that, under the circumstances aforesaid, the said bankrupts were, at and before the date and suing forth of the said commission of bankrupt against them, and still are, justly and truly indebted to this deponent in the sum of 6,013*l.*, being for so much money had and received by them as aforesaid on the sale of her stock."

That such deposition materially varied from all the usual affidavits upon which debts are proved under commissions of bankruptcy, and did not disclose the whole facts of the case.

That *Ann Keating* by the deposition swears, that, under the circumstances therein set forth, the said bankrupts were, at and before the date and suing forth of the said commission, and are still, justly and truly indebted to her in the sum of 6,013*l.*; but some material circumstances of the case are altogether omitted.

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That it is not stated in the said deposition that the supposed transfers of stock were made under a forged power of attorney; that it is not stated that the ex-aminant held the Bank of England liable to her for the said stock and the dividends thereon, and likewise that the Bank of England had engaged to replace the stock of the said claimant, upon her proving her said alleged debt against the said bankrupts' estate, and assigning such proof to the Bank of England; that it is not stated that the Bank of England had moreover actually paid to the claimant all the dividends upon her said stock which had accrued due since the bankruptcy of *Marsh, Stracey, and Co.*

That it is stated in the deposition, that *Ann Keating* was informed and believed that the contract therein mentioned was entered into by *Simpson*, as the broker of the bankrupts, whereas the fact is, that *Simpson* acted in the said sale by the order and as the broker of *Fauntleroy*.

That such debt is not proveable, for the following amongst other reasons.

Because the supposed transfer of stock was under a forged power of attorney, and in no way operated upon the interest of the owner of the stock, nor occasioned any such damage or injury as could give the owner of the stock any right to prove against the bankrupts' estate. Because *Ann Keating*, if she had any election, had already in fact elected to disaffirm the transaction, and claim her stock from the Bank of England, and that, in pursuance of the election, she had not only arranged with the Bank to replace her stock, but had moreover actually received from the Bank of England all the dividends upon the stock which

had accrued since the bankruptcy of *Marsh, Stracey, and Co.*

That the supposed transfer of the said stock and receipt of the money arose out of a felony ; the claimant had not prosecuted or taken any steps towards the conviction of the felon.

That the money in question, though paid to Messrs. *Martin, Stone, and Co.*, to the account of *Marsh, Stracey, and Co.*, was the money of *Fauntleroy*, obtained and paid in by him and in his name, and was never actually received by the firm of *Marsh, Stracey, and Co.*, or, if received at all, was received from *Fauntleroy*.

That it never was in any manner entered in the books of *Marsh, Stracey, and Co.*, as it would have been if *Fauntleroy* had intended it to be received and used by the said *Marsh, Stracey, and Co.* ; that *Fauntleroy* used the said account of *Marsh, Stracey, and Co.*, with Messrs. *Martin*, for his own individual purposes, as well as for the purposes of the partnership of *Marsh, Stracey, and Co.* ; and that, as respects money brought in by *Fauntleroy, Marsh, Stracey, and Co.*, ought not to be charged by payments to the account at Messrs. *Martin's*, unless the same were entered by *Fauntleroy*, shewing that he never intended such money to be for the use of Messrs. *Marsh and Co.*, and also that in point of fact they had not had the use thereof.

The petition then prayed that such proof might be expunged.

There were four other petitions to expunge other proofs, and a general petition, which prayed that the petitioners might file a bill in the Court of Chancery to expunge the said proof of the said *Ann Keating*, and that in the meantime the other petitions might stand

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over until a final decision should have been given in the suit so to be instituted. (a)

(a) The following is a copy of the general petition:—

In the matter of *W. Marsh, &c.*

That your petitioners, on the 31st July 1828, presented their petition to your Lordship, praying that your Lordship would be pleased to hear a petition which had been presented in this matter by *William Stone* and *Henry Gahagan*, and to reverse an order made, bearing date the 26th day of July 1827, whereby your Lordship did order that *William Stone* and *Henry Gahagan* should be at liberty to go in and prove a debt of 16,000*l.* against the estate of the said bankrupts, or that your Lordship would be pleased to permit your petitioners to file a bill in the High Court of Chancery to reverse the said order, and that the said proof might be expunged:

That by an order made on hearing the petition, on the 18th of December 1828, your Lordship was pleased to order that the petition should be, and the same was thereby dismissed:

That in consequence of the said decision eighteen other debts, claimed by various other persons, have been admitted to proof against the joint estate of the bankrupts, amounting to

207,700*l.*, under circumstances in many respects similar to those under which *William Stone* and *Henry Gahagan* were permitted to prove, and in particular the whole of such debts were claimed and proved in respect of monies alleged to have been received by the bankrupts as the price of stock in the public funds belonging to the respective claimants, and alleged to have been sold out and transferred by virtue of powers of attorney not executed by the claimants, or by their authority, but forged by *Henry Fauntleroy*:

That besides the said last-mentioned debts there are also other debts, the right to prove which will be governed by the same principles of law, amounting to 58,800*l.*, and making with those above mentioned 266,500*l.* and upwards in the whole:

That the funds of the partnership in which the said bankrupts were engaged were not benefited by the said monies thus arising from the proceeds of stock alleged to have been transferred under powers of attorney forged by *Henry Fauntleroy*, but he in very many instances took such monies directly to himself for his own individual use; and although in other instances he caused part of

Sir *Edward Sugden*, Mr. Serjeant *Spankie*, and Mr *Montagu* for the petition : —

The questions are of great importance, both from the

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the monies so arising to be mixed with the funds of the bankrupts, he either did so for the purpose of supplying and concealing from his partners the deficiency in the partnership funds which his previous fraudulent abstractions therefrom had occasioned ; or by various contrivances he repossessed himself of such monies, and concealed from his partners the fact of the same having been at all mixed with their funds ; and moreover he, besides taking for his own individual purposes all the monies arising from the proceeds of the stock, did moreover fraudulently abstract from the funds of the said partnership other monies to the amount of 90,000*l.* and upwards, and applied the same to his own use :

That in five of the said cases, viz. of Mrs. *Ann Keating*, of the Honourable and Reverend *George Rushant Bowles*, *Paul Shewcraft*, the executors of *Gilbert Gardiner*, and *James Deacon Hume*, and *John Goodchild*, your petitioners have presented petitions, praying that the proofs may be ordered to be expunged ; and in case such petitions shall be successful, your petitioners are advised that the whole of the said other proofs ought likewise to be expunged :

That amongst other questions which will arise at the hearing of the said petitions, there are certain questions of law applicable to the whole of the said proofs, which questions, as your petitioners are advised, are of great novelty and high importance ; viz.

That all the debts have been admitted to proof, upon an assumption that the claimants had lost the stock in respect of which they claimed to be admitted creditors for the proceeds, whereas your petitioners have been advised and insist that the supposed transfers of stock, having been under forged powers of attorney, in no way operated upon the interest of the owners of such stock ; but that such owners are in law still possessed of such stock, and cannot, therefore, have any right to prove against the bankrupts' estate :

That the debts have been admitted to proof, upon an assumption also that the claimants might elect to proceed, either against the bankrupts or against the Bank of England ; whereas your petitioners are advised and insist that the claimants had no such right of election, but if they had then that they had in point of fact already elected to proceed against the Bank of England, and

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amount depending—about 300,000*l.*—and the intricate law they involve. In examining these questions, this

therefore could not afterwards proceed against the bankrupts' estate :

That all the debts have been admitted to proof upon an assumption, likewise, that the felony committed by *Henry Fauntleroy*, in the forgery of the several powers of attorney, was not a bar to an action at law against the felon after conviction, for the proceeds of the stock, as money had and received by such felon for the use of the claimants; whereas your petitioners are advised and insist, that in such a case no action at law could be maintained by parties who had not prosecuted or taken any steps towards the conviction of the felon; and moreover that in such a case no action at law could be maintained upon a contract, and therefore that the said debts were not proveable in bankruptcy :

That your petitioners are advised, that the foregoing questions, both in respect to their novelty and importance, and also in respect of the large amount of proofs under the commission to be affected by them, are deserving of the most solemn adjudication before the highest tribunals in the country :

That the first of the above-mentioned questions was lately presented to the consideration of

the Court of Common Pleas upon a special verdict in a certain action there depending, wherein *Sir Edward Stracey* bart., and another, are plaintiffs, and the Governor and Company of the Bank of England are defendants; and by the judgment lately pronounced by the said Court, it is understood that the said Court adhered to the principles of a former judgment theretofore given by them in another cause, establishing that the interest of a stockholder is in no way operated upon by forgery; but the said Court gave judgment in the said action of *Stracey* against the Bank of England upon another collateral point :

That the plaintiffs in the said action have brought their writ of error for the purpose of having the determination of the Court of King's Bench, and ultimately, if necessary, of the House of Lords, whether the said judgment of the Court of Common Pleas should not be reversed, and whether judgment should not be given for the plaintiffs in the said action, by reason that the stock of the said plaintiffs was in no way operated upon by a forged power of attorney; and that the said plaintiffs were in law still possessed of the said stock at the time of bringing their action.

Court, which requires that its conscience should be satisfied, will not suffer itself to be prejudiced by any previous decision, if, amidst the multiplicity of cases decided in the courts of common law, it appear to this Court that the judgment in this case may be erroneous.

In *Utterson v. Vernon*, 3 T. R. 539, Lord *Thurlow* sent an issue respecting a proof of a debt to be tried in the Court of King's Bench, which held that the debt was provable. His Lordship was dissatisfied with the judgment, and returned the case for re-consideration, when a directly opposite opinion was returned; it is reported in 4 T. R. 570; Lord *Kenyon* says, "The circumstance which had too great effect upon our minds on the former occasion was the extreme hardship of the case, for it appeared that the plaintiff, who had advanced this money to the bankrupt, and which constituted a considerable part of the money to be distributed among her creditors, should be himself excluded from receiving any portion of this fund in satisfaction of his own debt."

A mistake of a similar nature was made in the case of *Jervis v. Tayleur*, 3 Barn. & Ald. 557, and in a late case in this court, *ex parte The Lancaster Canal Company*, Mont. & Bli. 94. Lord *Lyndhurst* overruled the case of *ex parte The Vauxhall Bridge Company*, 1 Gl. & J. 101. The Court, therefore, will not suffer itself to be improperly influenced by the former decision in this very case, either in the Court of King's Bench or by Lord *Lyndhurst*.

The question is, whether the debt be provable against the joint estate, either as an equitable or a legal debt.

As to its being an equitable debt, the facts are, that *Fauntleroy*, a felon, cheated the Bank of England, and cheated and ruined his partners, and there is not, from this fact, any equity that the joint creditors should pay the separate debts of *Fauntleroy*. If he were alive he could not sue his partners, and the creditors under

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a bankruptcy can only claim through the equities of their debtor, *ex parte Ruffin*, 6 Ves. 127. The equity here is not that the joint creditors should pay the separate debts of *Fauntleroy*, but that the separate estate should pay its own debts.

That there is no equity in this case will appear from the fact, that *Fauntleroy*, had he been alive, could not have supported a bill in equity to avail himself of the advantage resulting from his own fraud, nor could he have maintained an action of *indebitatus assumpsit*, in which he could only recover what, in conscience, was due to him.

It was imagined, during the argument of *ex parte Bolland*, Mont. & Mac. 315, that Lord Eldon had supposed it might constitute an equitable debt; Mr. Serjeant *Bosanquet* having said, "At the time when these subjects were discussed before my Lord Eldon, it was contemplated that some question of law would arise that might defeat the consideration, whether this, although not a legal debt, was not an equitable debt, and of course provable in bankruptcy." But this was a most erroneous supposition. No person knew better than Lord Eldon the nature of equitable debts, and it was not with this object that his Lordship sent the case for the opinion of a court of law.

So far from this being an equitable debt, it is most inequitable that the joint creditors should be obliged to pay the separate debts of *Fauntleroy*, and if provable, it must be, because, *strictissimi juris*, it is a legal debt.

[As to its being a legal debt, the arguments were so similar to the reported case of *ex parte Bolland*, Mont. & Mac. 315, that it is deemed sufficient to state the outline, referring to that report for particulars.]

The general requisites for the proof of a legal debt are a right of action on a contract before the bank-

ruptcy; all of which, it was contended, were in this case wanting. (a)

No action is maintainable in this case. First, because the party is not injured, as the right to the stock is not altered. (b) *Davis v. The Bank*, 2 Bing. 402; *Hume v. Bolland*, 1 Ry. & Mo. 371; *Ashby v. Blackwall*, 2 Eden, 299. And this question was not decided either before the Court of King's Bench or before Lord *Lyndhurst*, but was cautiously avoided. (c) And, secondly, because the party has not prosecuted or assisted in prosecuting the felon. (d)

But supposing an action to be maintainable, it would not be an action on a contract, *Barron v. Sparrow*, 7 Barn. & Cres. 313. (e)

With respect to that part of the prayer of the petition which asks that the opinion of the House of Lords may be taken, the case, from the magnitude of the sum in dispute, and from the novelty and intricacy of the question, requires the most solemn decision, and it has been the habit of the Court on similar occasions so to refer. *Bromley v. Goodere*, 1 Ath. 75; *Clarke v. Capron*, 2 Ves. jun. 668; *ex parte Ruffin*, 6 Ves. 129; *ex parte Fell*, 10 Ves. 348; *ex parte Rushforth*, 10 Ves. 423.

The Solicitor General, Sir *Charles Wetherell*, Mr. *Phillimore*, and Mr. *Wigram* for the respondents:—

[The answers to the general arguments, as to the debt being provable, were of the same nature as on the petition. *Ex parte Bolland*, *Mont. & Mac.* 399.]

As to the application for leave to file a bill, this was refused by Lord *Lyndhurst* in *ex parte Bolland*, *Mont. & Mac.* 359, and the present question is in substance

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(a) See *Mont. & Mac.* 326.

(b) *Mont. & Mac.* 334.

(c) See *Mont. & Mac.* 381.

(d) See *Mont. & Mac.* 339 to

356.

(e) *Mont. & Mac.* 376.

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the same as was there agitated. Assuming that the case is of sufficient importance to require further consideration, the most expeditious method of proceeding will be, for the Lord Chancellor to request the assistance of two of the judges, or to have a special verdict taken up to the House of Lords. A bill lies only in an equitable case, and in this case could be demurred to, unless the Chancellor restrained the demurrer, which would be quite a novel mode of proceeding, and one which the Lords would not recognize.

The LORD CHANCELLOR did not deliver any judgment in Court. The following minutes of the order were delivered to the parties by his Lordship's secretary:

April 21,
 1831.

"I do order that the said petitioners be at liberty to file a bill in the High Court of Chancery, to expunge the said proof made by the said *Ann Keating*; and that, until a final decision be obtained in the suit so to be instituted, the said respondents be at liberty from time to time to present any petition to this Court as to the disposition of the dividends to be declared in the meantime in respect of the said proof, as they shall be advised, when such order shall from time to time be made thereon as shall be just; and I do further order, that the said petitions herein set forth, and also the said four other petitions in this matter therein referred to, do stand over generally." No such order was, however, made, for

May 11,
 1831.

On this day it was moved by the Solicitor General and Mr. *Wigram*, for the respondents, that an action should be brought by *Ann Keating* against *Marsh*, *Stracey*, and *Graham*, in the King's Bench, for the trial of the question, Whether the bankrupts were, at and before the date and suing forth of the commissions, justly and truly indebted to *Ann Keating* in any and

what sum of money? and that a special verdict should be taken in the action by consent, on a statement of facts to be attested by the Lord Chancellor; that the defendants should consent to judgment being entered up for the plaintiffs in the inferior courts, and that the same should be carried by writ of error to the House of Lords; it being distinctly agreed that the judgment of the courts below to be so taken by consent should not prejudice the right or case of the defendants.

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The following order was made on this motion : —

“ That, for the purpose of trying whether the bankrupts were, at and before the date of the joint and separate commissions, indebted to *Ann Keating*, an action be brought by or in her name against *Marsh, Stracey, and Graham*, in the King’s Bench, for money had and received by them to her use; and that a special verdict be taken in such action on a statement of facts, to be settled and certified by the Lord Chancellor, in case the parties differ about the same; and that the defendants in such action consent to judgment being entered up in the said court, and in the court of error for the plaintiff, for the purpose of being carried by writ of error before the House of Lords, without prejudice to the rights and case of the defendants; and that the action be carried by writ of error before the House of Lords accordingly; and that the petitions, &c. do stand over generally, with liberty to either party to apply; and that the sum of 95,559*l.*, the amount of dividends declared on the proof of *Ann Keating*, and of several other proofs in respect of the proceeds of stock sold under powers of attorney alleged to have been forged, be invested by the assignees under the joint commission in exchequer bills, and the interest thereon accumulate, to abide the further order of this Court as to the distribution of the principal.”

May 12,
1831.

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Fauntleroy, a partner in a banking house, transferred bank stock belonging to a customer by a forged power of attorney: the proceeds were paid to the account of the partnership, and afterwards appropriated by *Fauntleroy*, who was subsequently executed for other forgeries. The other partners were ignorant of the transaction, but with common diligence would have known of it.

Held, the customer could maintain an action against the partners for money had and received.

Confirmed on appeal, *post*, 592.

AN action of assumpsit was accordingly brought by *Mrs. Keating*. The declaration contained merely the common count for money had and received to and for the use of the plaintiff. The defendant pleaded the general issue. The cause was set down for trial at the London sittings after Hilary term 1832, and a special verdict was taken by consent, the substance of which is as follows: (a)

That, on the 10th of October 1819, there was standing in the Bank of England 12,000*l.* [here follow

(a) The following is the special verdict at full length, omitting formal words:

"That on the 10th of October 1819 there was standing in the books of the Bank of England, in the name of the plaintiff, 12,000*l.* reduced three per cent, annuities; that the accounts of the proprietors of the said stock are kept in certain books called ledgers, and that accounts are entered in the form of debtor and creditor accounts in the said ledgers of the whole amount of the said stock, in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit on the one side of the account, and on the other side they are debited with all sums transferred from their names; and that certain other books are kept, in which are entered transfers of the said stock, from time to time, pur-

porting to be signed by the parties transferring the same, or their attorney, lawfully authorized: That upon production of the transfer books, the clerks who keep the ledgers enter the sums transferred to the credit of the persons to whom the transfers are made, by adding those sums to their accounts, if they already have any, or by opening new accounts with such persons if they have not: That no entries in the ledgers are made without the authority of entries made in the transfer books; but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further inquiry as to the genuineness thereof; and that any person on whose account any sum of stock appears in such ledger is permitted at any time, on application at the bank, to transfer the same, or

statements as to the mode of entry and transfer of stock]: That *Marsh* received the dividends thereon in October

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any part thereof, at his discretion: That the accounts are balanced twice a year, for making out dividends, and that the aggregate amount of the balances form the aggregate of the stock called reduced three per cent. annuities, and that such aggregate amount is transmitted half-yearly to the audit office of the exchequer for the purpose of ascertaining the amount which will be wanted for dividends, and that the dividends are calculated on the balance so ascertained: That an account is also once a year transmitted to the audit office of the exchequer, which contains the names of all persons who appear by the books kept at the Bank as aforesaid to be the proprietors of any part of the said annuities: That the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto: That *Marsh* received the dividends of 12,000*l.* in the said stock in October 1819, by virtue of a power of attorney dated the 7th June 1803, from the plaintiff to *Marsh, Sibbald, Stracey, and Fauntleroy*, being the persons at the date thereof composing the firm of *Marsh, Sibbald, and Company*, and paid

to *Marsh* and Co., bankers, to the account of the plaintiff, who had a banking account with the said house: That on the 29th of December 1819, an entry was made in one of the transfer books of the Bank, purporting to be a transfer under a power of attorney, purporting to be granted by the plaintiff to *Marsh, Stracey, Graham, and Fauntleroy*, the persons who at the date thereof composed the firm of *Marsh and Company*, jointly, and each of them severally, of a share in the said stock."

[The form of the entry was here set out, purporting to transfer 9,000*l.* stock to *Tarbutt*, a stock-broker.]

"That the power of attorney under which the entry was made was not executed by the plaintiff, but the signature was forged by *Fauntleroy*, and that he had not any authority to make such transfer; and that the plaintiff did not authorize or request the Governor and Company to make any transfer of the 9,000*l.* stock: That, in consequence of such entry in the transfer book, an entry was made in one of the ledgers, by which the plaintiff was debited with the 9,000*l.*, and credit was given to *Tarbutt* for the 9,000*l.*, and from that time the plaintiff ceased to have credit for the said sum; and

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1819,—under a power of attorney, dated 7th June 1809, from *Ann Keating to Marsh, Sibbald, Stracey, and Faunt-*

that on the 11th of January 1820 *Marsh* and Company purchased for the plaintiff 3,000*l.* reduced three per cent. annuities, and caused the same to be transferred to the plaintiff, whereby there appeared 6,000*l.* to the credit of the plaintiff in the ledgers kept at the Bank, and no more: That *Marsh* attended at the Bank, and received the dividend on the 6,000*l.* on the 5th of April 1820, and signed a receipt for the same as attorney of the plaintiff: That since the 29th of December 1819 very numerous transfers of reduced three per cent. annuities of sums, both great and small, have been made to and by *Tarbutt*, which have been debited and credited to him; and that the 9,000*l.* has become blended with other stocks standing in the ledgers in *Tarbutt's* name, and appears to have been transferred and assigned by him, and it is not possible to distinguish the account to the credit of which the 9,000*l.* stands, which was so carried to the credit of *Tarbutt*, and debited to the plaintiff as aforesaid; and that no dividend warrant has at any time since the 9th of December 1819 been made out for the dividends on the 9,000*l.* in favour of the plaintiff, either together with or apart from any other sum of stock, but

that the dividend thereon has been ever since paid to other persons appearing on the books to be the transferees thereof: That the plaintiff did not consent to and had not any knowledge of the above entries or entry: That on the 10th of September 1824 *Fauntleroy* was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of England, and that the Bank undertook to prosecute *Fauntleroy*: That the plaintiff informed the Bank of the forgery as soon as the same came to her knowledge; and that the Governor and Company caused several indictments to be prepared against *Fauntleroy*, for forging letters of attorney for transfer of parts of the annuities transferrable at the Bank, and that *Fauntleroy* was tried and convicted on the 30th of October 1824, and executed on the 30th of November in the same year; but that neither the plaintiff nor the Governor and Company preferred any indictment against *Fauntleroy* in respect of forgery of the power of attorney hereinbefore referred to: That *Marsh* and Co. kept an account with *Martin, Stone, and Co.*, bankers, London, in the usual way of a banker's account; and that a

leroy, then composing the firm,—and paid them into the banking-house of *Marsh* and Co. to the account of *Ann*

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pass-book went from one house to the other from time to time, according to the usual practice between bankers: That *Marsh* and Co. kept a house-book, in which corresponding entries to those in the pass-book ought to have been made, and that in the due course of business the pass-book and the house-book ought to have corresponded: That the house-book was in constant use in the banking-house of *Marsh* and Co., and that the pass-book was frequently brought thither from the house of *Martin* and Co., and that when it was at the banking-house of *Marsh* and Co. *Fauntleroy* kept the same generally locked up in his own desk: That *Fauntleroy* was permitted by the other bankers to conduct the greater part of the business of the said banking-house, without their interference, that they reposed great confidence in him, and that he made very many false entries and omissions in the house-book, so that the same did not correspond with the pass-book in many instances: That *Fauntleroy* paid to *Martin* and Co. and drew out considerable sums for his own individual use, which appear respectively in the pass-book, but not in the house-book, and also made very many false entries in the other books

of the firm, without the knowledge and in fraud of his partners, to a large amount: That on the 29th of December 1819 *Fauntleroy* ordered *Simpson*, a stock-broker, to sell out the sum of 9,000*l.* described as standing in the books of the Bank of England in the name of the plaintiff, and that *Simpson* sold the same to *Tarbutt* for 6,013*l.*, which he received from *Tarbutt*: That, according to the course of business between *Simpson* and *Marsh* and Co., *Simpson* allowed *Marsh* and Co. one half of the usual commission when employed by them to effect sales, and upon the said sale he allowed one half of the commission; and that *Simpson* paid 6,013*l.*, being the amount received from *Tarbutt*, deducting one half of the usual commission, by a check payable to *Marsh* and Co., to Messrs. *Martin* and Co., to the account of *Marsh* and Co.; and the same was entered by them in their pass-book as 'Cash per *Fauntleroy*,' the name of *Fauntleroy* denoting the name of the individual by or on whose behalf the payment was made: That no entry was made at any time of the 6,013*l.* in the house-book, or any other books of *Marsh* and Co., but only in the pass-book of that firm with *Martin* and Co.: That it was the

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Keating, who kept a banking account there: That on the 29th of December 1819 an entry was made in the

business of *Fauntleroy*, as between himself and his co-partners, to have entered the said sum in the house book, if it had been intended by him for the account of *Marsh* and Co.: That among the books kept by *Marsh* and Co. there was, besides the said house-book, a daily balancing-book, purporting to contain a daily record of the amount of cash left in the drawers in Berner Street, and the amount of cash at *Martin* and Co.'s, as shown by the said house-book, after the conclusion of each day's transactions, accompanied by a proof of the correctness of such balance: That *Fauntleroy* in general made up such daily balances in the balancing-book, and the said sum of 6,013*l.* was not entered in the house-book, nor in the daily balancing-book, on the 29th of December 1819, or at any other time, nor did the same ever come into the yearly balances of *Marsh* and Co., or in any other manner into their books: That no individual partner of *Marsh* and Co. could draw monies out of the account of *Martin* and Co. but by drafts signed in the partnership name or firm; but that *Fauntleroy* paid in, and, by means of such drafts, drew out large sums of money for his own individual purposes; and that the account between *Marsh* and Co. and *Martin* and Co. was repeatedly balanced between the 29th December 1819 and the bankruptcy of *Marsh* and Co.: That in consequence of the discovery of the forgeries of *Fauntleroy* a commission issued against them on the 16th of September 1824, and on the 29th of October following a commission issued against *Fauntleroy*: That in April 1820 credit was given to the plaintiff by *Marsh* and Co. for the dividend on 15,000*l.* reduced three per cent. annuities, 9,000*l.* stock, parcel thereof, being the 9,000*l.* reduced annuities before mentioned, the entries respecting the said dividends being made by *Fauntleroy*, or under his immediate direction; and that from April 1820 up to the date of the bankruptcy entries were made in the books of *Marsh* and Co. by which the plaintiff's account was credited with a sum as the dividends on the reduced three per cent. annuities then in her name, including the dividends on the 9,000*l.*, as if those dividends had been regularly received from time to time, such entries having likewise been made by *Fauntleroy*, or under his immediate directions; and that, until after the apprehension of *Fauntleroy* before

transfer books of the Bank of England, purporting to be a transfer of 9,000*l.* stock,—under power of attorney

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mentioned, *Marsh, Stracey*, and *Graham*, and each of them, were wholly ignorant of the forgery: That after the bankruptcy the plaintiff made application to the Bank respecting the 9,000*l.* stock, and that the following letter was written by the attorneys of the Bank to the plaintiff:—

“ New Bank Buildings,
4th Dec. 1824.

“ Madam,

“ The Governor and Directors of the Bank of England have had under their consideration your claim to have 9,000*l.* reduced three per cent. annuities, which formerly stood in your name, replaced. They find, upon inquiry, that the stock in question was sold and transferred in your name by one of the partners of the late firm of *Marsh, Stracey*, and Company, and that the produce of the stock was paid into the funds of Messrs. *Marsh, Stracey*, and Company; you have therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. *Marsh, Stracey*, and Company’s commission, and we are directed by the Governor and Directors to request that such proof may be tendered and enforced by petition, if it should

not be admitted by the commissioners, after which the Bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. *Marsh, Stracey*, and Company, will also be paid to you.

“ We beg to add, that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

“ We are, Madam,

“ Your most obedient servants,

“ FRESHFIELD and KAYE.”

“ Mrs. Keating.”

“ That on the 1st of August 1825 the Bank paid the plaintiff 270*l.*, on her signing the following receipt and agreement:—

“ August 1, 1825.—Received of the Governor and Company of the Bank of England the sum of 270*l.*, being the amount which would have been payable to me by way of dividend on 9,000*l.* reduced three per cent. annuities heretofore standing in my name for the two half years ending the 10th day of October and 5th day of April last, if that stock had not been transferred, as I allege

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which purported to be granted by *Ann Keating* to *Fauntleroy*,—to *W. B. Tarbutt*, stock-broker to *Marsh*,

it to have been, without any legal authority from me.

"I say, received the same, without prejudice to any right I may have to prove for the produce of the said stock under *Marsh* and Company's commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I do hereby engage (in case the said debts should be decided by a court of law to be provable against the said bankrupts' estate), when required by the said Governor and Company, and at their expence, to tender or cause to be tendered a proof to the commissioners under the bankruptcy of *Marsh* and Company, in respect of the produce of such stock so sold out by them; and in case such proof shall be rejected, to permit my name to be used in a petition to be presented by and at the expence of the said Governor and Company to the Court of Chancery, for the purpose of enforcing their acceptance of such proof as a debt against the said bankrupts' estate, on being indemnified by the said Governor and Company from all costs, charges, and expences which I may sustain or be put to in respect thereof, without prejudice to my right to claim,

notwithstanding such proof, to have the said stock replaced in my name by them.

"ANN KEATING."

"Witness. *David Davies*,
 Clerk to *D. Clifton*."

"That the plaintiff, being examined under the commission against *Marsh* and Co., signed, by her agent, the admission following; that is to say,

"In the matter of *Marsh* and Company, *ex parte Ann Keating*."

"The said *Ann Keating* hereby admits, that the paper writing, bearing date the 23d of December 1819, and purporting to be a power of attorney from her to *William Marsh*, *Josias Henry Stracey*, *Henry Fauntleroy*, and *George Edward Graham*, referred to in the examination of *James Fenn* before the commissioners on 18th September last and 4th June instant, and exhibited to the commissioners, was not executed by her, or by her authority, but is forged and fraudulent: That she discovered such forgery at or about the time of the apprehension of *Henry Fauntleroy* in September 1824, and gave information thereof to the Governor and Company of the Bank

Stracey, and *Graham*, then constituting the firm of *Marsh and Co.*: That this power of attorney was not executed by *Ann Keating*, but her signature forged by *Fauntleroy*: That, on the 11th of January 1820, *Marsh and Co.* purchased for and caused to be transferred to *Ann Keating* 3,000*l.* stock, whereby there appeared 6,000*l.* standing in the name of *Ann Keating*, and no more (a); on the 5th of April 1820 *Marsh* received the dividends on this 6,000*l.* stock as the attorney of *Ann Keating*:

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of England, but did not institute any criminal proceedings against any person in respect of such forgery; and further, that she the said *Ann Keating* has demanded from the said Governor and Company the full amount of stock in respect of which the present claim is made, and all dividends thereon; and that she intends to insist upon such demand, and to enforce the same by law, if necessary; and that 13*l.* is the amount of the half-yearly payment of the said annuity; and that she has received the said sum of 13*l.* half-yearly from the Bank of England from the time of *Marsh and Company's* bankruptcy down to the present time, upon signing a receipt and undertaking, whereof the following is a copy.

[Here follows the receipt and undertaking already set out.]

"And the said *Ann Keating* further admits, that this claim is prosecuted by, and for the benefit, and at the expence of the Bank of England, and that whether the same shall fail or be

established, she insists upon her demand against the Bank of England as above stated.

"FRESHFIELD and Son,
Solicitors for Mrs. *Keating* in
the matter of this claim."

"But whether or not, upon the whole matter, the defendants did undertake and promise, the jurors aforesaid are altogether ignorant; and if it shall seem to the Court that the defendants did undertake and promise, then the jurors aforesaid, upon their oath aforesaid, say, that the defendants did undertake and promise, and in that case they assess the damages of the plaintiff to 6,013*l.* 2*s.* 6*d.*; but if it shall seem to the Court that the defendants did not undertake and promise, then the jurors say, that the defendants did not undertake or promise."

(a) Originally she had 12,000*l.* stock. *Fauntleroy* transferred 9,000*l.*, leaving 3,000*l.*, to which *Marsh* added 3,000*l.*, making 6,000*l.* as above.

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That since the 29th of September 1819 numerous transfers of stock had been made to and by *W. B. Tarbutt*, and that the 9,000*l.* stock had become blended in the Bank books with other stocks standing in his name, and appeared to have been transferred by him, and it was not possible to distinguish the account to which the credit of the 9,000*l.* stock stood; and that no dividend warrant had, since the 9th of December 1819, been made out in respect of the dividends on the 9,000*l.* stock in favour of *Ann Keating*, but to other persons appearing on the Bank books to be the transferees thereof.

That *Ann Keating* did not consent to and had no knowledge of the transaction as to the 9,000*l.*

That on the 10th of September 1824 *Fauntleroy* was apprehended on a charge of forging letters of attorney, was indicted and prosecuted by the Bank, and executed the 30th of October 1824: That *Ann Keating* informed the Bank of the forgery as soon as it came to her knowledge: Neither *Ann Keating* nor the Bank indicted *Fauntleroy* for the forgery as to *Ann Keating's* 9,000*l.* stock: That *Marsh* and Co. kept an account with *Martin* and Co., bankers; that the usual pass-book was used, and that the house-book of *Marsh* and Co. ought to correspond therewith: That *Fauntleroy* generally kept this pass-book locked up in his desk: That *Fauntleroy* conducted the greater part of the business of the banking-house without the interference of the other partners, who reposed great confidence in him: That *Fauntleroy* made very many false entries and omissions in the house-book, so that it did not correspond with the pass-book: That *Fauntleroy* paid to *Martin* and Co. and drew out of their hands considerable sums for his individual use, which appeared in the pass-book, but not in the house-book: That *Fauntleroy* also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners to a large amount.

That on the 29th of September 1819 *Fauntleroy* ordered *Simpson*, a stock-broker, to sell out 9,000*l.* stock, described as *Ann Keating's*, who sold it to *Tarbutt* for 6,018*l.* *Simpson* allowed *Marsh* and Co. one half the usual commission on such sales. The proceeds were paid to *Martin* and Co. on account of *Marsh* and Co. No entry was made of this sale in the house-book, nor in any other book of *Marsh* and Co., but only in the pass-book of *Martin* and Co. None of the firm of *Marsh* and Co. could draw monies out of the banking-house of *Martin* and Co. but by drafts signed in the partnership name.

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That a commission issued against *Marsh*, *Stracey*, and *Graham* on the 16th of September 1824; and on the 29th of October 1824 one issued against *Fauntleroy*.

That from April 1820 up to the bankruptcy, credit was given to *Ann Keating* for the dividends on 15,000*l.* stock, parcel thereof being the 9,000*l.* stock before mentioned; entries being made by *Fauntleroy*, or under his immediate direction, as if these dividends had regularly been received from time to time: That till the apprehension of *Fauntleroy*, Messrs. *Marsh*, *Stracey*, and *Graham* were wholly ignorant of the forgery on *Ann Keating*.

That after the bankruptcy, *Ann Keating* applied to the Bank respecting the 9,000*l.* stock, and received a letter from the Bank solicitors, informing her that she might prove against *Marsh* and Co., and that, on assigning her proof to the Bank, they would replace her stock. On the 1st of August 1825 the Bank paid *Ann Keating* the dividends on 9,000*l.* stock, without prejudice, she engaging to tender a proof. *Ann Keating*, being examined before the commissioners, signed an admission of some of the above facts, and that her claim was prosecuted by and for the benefit and at the expence of the Bank, and that if it failed she insisted on her claim against the Bank; and the verdict concluded specially.

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In Easter Term 1832 judgment was entered up in the King's Bench for the plaintiff, without argument; a writ of error was thereupon brought, *pro forma*, in the Court of Exchequer Chamber, and the judgment below, without argument, was affirmed. The judgments were entered without argument, the object of the parties being to bring the matter before the House of Lords without delay. From these judgments *Marsh* and Co. presented an appeal.

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Keating v. Marsh, ante, 582, confirmed on appeal.

THE reasons given by the plaintiffs in error, why the judgments below should be reversed, were as follow :

1st, Because Mrs. *Keating*, the defendant in error, is still the proprietor of the 9,000*l.* stock; she could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode has not in the present case been adopted; Mrs. *Keating's* rights are therefore untouched, and her property in the stock is not divested. The act which is supposed to have deprived Mrs. *Keating* of her property, and conveyed it to another, is merely an unauthorized entry in the Bank books, made without the knowledge or consent of the stock proprietor, and without the signature of herself or her attorney, as required by the statutes. If by such means the property in stock could be divested, any one, or the entire body of the public creditors, might in a day be despoiled of their whole properties and fortunes by the fraud or the negligence of a few clerks in the Bank. It may be said that the parties injured have a remedy

against those who have profited by the fraud, or against the Bank of England; but this proposition assumes that the property is divested, which is the question at issue. The party cannot be the creditor of the government and yet have a right of action against the Bank; and it is contended that the public creditor, who has duly and in the manner prescribed by the statutes invested his money in public securities, has a right to look to the state for the safety of his property, and that his claim upon the state, which he has purchased for good consideration, and upon the faith of many acts of parliament, cannot be destroyed, or in anywise altered or affected, without his own consent. Here no consent, prior or subsequent, express or implied, has been given. The question of transfer rests upon the mere entry in the Bank books, and it is contended that the entry, although it is the record or registration of a transfer, and may be good *prima facie* evidence of a transfer, cannot of itself effect the transfer and work a change of property, unless coupled with the authority and signature required by the act of parliament. By the constitution of the public debt, under the acts of parliament by which it is created, the government are the debtors and obligors in the payment of the annuities stipulated, to the parties entitled by original subscription, or legal transfer. No act of the government, or its agents, in the management of the accounts, can alter the legal rights of the parties entitled. No fraud or mistake of the government, or its agents, could change the right of a stockholder, from a right to a parliamentary annuity, into an action of damages against the government, or the Bank, or any other party whatsoever. The simple question is,—Has the individual stockholder transferred it. The duty of the government, or its agents, is merely to conduct, as instruments, a transaction

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founded upon a legal and valid contract between the stockholder and any purchaser to whom he shall assign and transfer his right; but it is undeniable that Mrs. *Keating*, according to the truth of the case found and shewn by the special verdict, neither sold nor transferred, nor affirmed any act professing to be a sale and transfer of her stock, in consequence of which the pretended transfer in the books of the Bank appears to have been made. No proposition can be more clear and certain, than that a creditor, whether of the government or of an individual, cannot be deprived of his right to a debt, unless by some act to which he is, by himself or his agent, a party, or by the express provision of an act of parliament. If this be so, Mrs. *Keating* is still the proprietor of the stock; her claim is against the state, and her position is unaltered.

2dly, Because, although it should be contended that Mrs. *Keating* may elect to affirm the act of transfer by subsequent recognition, although it was originally done without her authority, yet no such affirmance has taken place. On the contrary, the special verdict finds that the act was done without her knowledge or consent, and that she never did assent to it. To entitle the defendant in error to rely on a subsequent recognition, that fact should have been found: not being found, it cannot be inferred; and even if there were any grounds for such an inference — which is denied — no affirmance can be implied before the bankruptcy of *Marsh* and Company, to the time of which this action — being with a view to proof under the commission — relates. Besides, Mrs. *Keating* cannot at once affirm and disaffirm the same act; and it appears by the special verdict that she has insisted on her remedy against the Bank, and has actually received the amount of some of the dividends. It is further submitted, that the doctrine of *ratihabitio*

does not apply to the present case ; for although a person may affirm an act done in his name, but without his authority, as against the party doing the act, it is because such party is estopped from saying that he has not the authority which he pretended to have ; but he has no such right against third persons, and therefore, even if Mrs. *Keating* could have affirmed the transfer, as against *Fauntleroy*, and treated the produce as money had and received to her use in his hands, she has no such election against *Marsh* and Company, between whom and herself there was no privity, and who are not estopped — even if *Fauntleroy* was — from saying that the transfer was without authority, and therefore void. If under any circumstances Mrs. *Keating* might make such election as against Messrs. *Marsh* and Company, she was bound to elect promptly, and give notice to *Marsh* and Company, in order that they might retain any money they might have received, or adopt any other remedy they might possess against *Fauntleroy* ; but no such election or notice is found by the verdict. It is likewise submitted that the felonious act of *Fauntleroy* could not be made valid by affirmance, especially against parties innocent, and not cognizant of the felony, and where the felon has not been prosecuted for such felony, nor was it competent for the plaintiff below to maintain any action either against the said *Henry Fauntleroy* or any person deriving through him, for restitution of the property divested by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon.

3dly, Because this action being for money had and received, cannot be maintained against *Marsh* and Company ; they never did, in fact, receive the money ; there was no constructive receipt of it by any entry in their books, or acknowledgment to the party claiming it. It

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was paid into *Martin* and Company's by *Fauntleroy*, and drawn out without their knowledge; the money itself cannot be identified, and there is no privity between the plaintiff and the defendants. Even supposing the money had actually come to their hands, and been afterwards drawn out by *Fauntleroy*, it is contended they would not have been liable any more than a banker, into whose hands money obtained by felony or fraud had been paid in, and afterwards drawn out by a customer in the usual course of business, would be liable to the party defrauded. In the transaction by which *Fauntleroy* became possessed of the money paid into *Martin* and Company's, he did not act as partner of the firm of *Marsh* and Company, nor for their benefit; it was a step in the conduct of the fraud and felony adopted for his own convenience. The money was not obtained on the authority of the partnership, nor in fact applied to its purposes. It was money which neither actually nor constructively was received to the use of *Mrs. Keating*. It is a mere fiction to treat this money as the money of *Mrs. Keating*. It is an additional fiction to imply a legal contract from circumstances inconsistent with the facts of the case. The money was obtained by a felonious act, and can the innocent partners, by implication of law, be made parties to the wrongful act? The real facts of the case, as found by the special verdict, negative any tortious or beneficial receipt of this money by the firm of *Marsh* and Company, from which a legal liability to *Mrs. Keating* can be implied. It is further submitted, that this is an equitable action, and that the Bank of England, being the real claimants, they cannot enforce against *Marsh* and Company a claim which arises only by means of their own negligence; that no negligence is found in *Marsh* and Company, but that even if there were negligence on both

sides, the parties are *in pari delicto*, and the rule, *potior est conditio possidentis*, applies.

The reasons given, *contra*, by the defendant in error were as follow : —

For that the stock in question having been sold by order of one of the partners of the house of *Marsh* and Co., who were the bankers of the defendant in error and her agents in regard to that stock, and the produce having been paid to the said house, they are liable in an action for money had and received to account to the plaintiff for the sum so received.

This case was argued on the 24th and 25th of June 1833 by Sir *Edward Sugden*, Serjeant *Spankie*, and Mr. *F. Kelly*, for the plaintiffs in error, and Serjeant *Taddy* and Sir *James Scarlett* for the defendants. The arguments, being of the same nature as on the original petition, and being moreover fully noticed in the judgment, are not here repeated. On the 25th of June 1834 judgment was delivered as follows : —

Mr. Justice *Park* : —

The question amounts in substance to this : whether the produce of stock, formerly standing in the name of Mrs. *Ann Keating*, the plaintiff below, but transferred out of her name on the 29th December 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the defendants below, the bankers of Mrs. *Keating*, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners to the use of the plaintiff below, and be recovered by her in that form of action ? And after hearing the argument, and after consideration of the facts stated in the special verdict, all the Judges who were present at the

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argument, including the Lord Chief Justice of the Common Pleas, who is absent at *Nisi Prius*, and Mr. Baron Bayley, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the plaintiff's right to recover, and upon which great reliance has been placed, is an objection which, if allowed to prevail, would be equally strong against the plaintiff's right to recover damages in any form of action, and against any person. It is objected that the plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz. "by entries in the transfer books kept at the Bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attorneys, authorized by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer book kept at the Bank not having been signed by the party making the transfer, nor by any attorney authorized by writing under her hand and seal, it is contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis v. the Bank of England*, 2 Bing. 309, is cited and relied upon as an authority directly in point in support of such proposition; but we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition above advanced, or the authority of the case cited in support of it; for although the proposition

may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty, still, under the circumstances stated in the special verdict, we are of opinion that the plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability, under which Mrs. *Keating* would be placed, if, as matters now remain, she should elect either to receive the dividends or to sell her stock; it is sufficient to observe, that the special verdict finds, that when stock is sold, an entry of the transfer is made in the Bank books, and the name of the purchaser substituted for that of the seller; that the dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed. Now it is obvious that a transfer, under a forged power, or by an impostor, has all the appearance, and, unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer: his name is entered in the Bank books as the stockholder; the dividend warrants are made out in his name; and he, as the holder of the warrant, has the right to insist upon the payment of the dividends; and in this particular case the special verdict finds, that it is not possible to distinguish the accounts, to the credit of which the plaintiff's stock, so sold under the power of attorney, now stands. If the plaintiff below, therefore, were to apply to receive payment of the dividends, or to sell the stock, she would be met with an insuperable difficulty. Although the stock may, in con-

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temptation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the Bank to purchase, *de novo*, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process, or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock to be her money, and to follow it into the hands of the present defendants below?

This, as before stated, appears to us to be the question reserved for our consideration, and upon this question we think her at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it, unless any of the objections which have been urged at your Lordships' bar should be allowed to be available under the particular circumstances of this case.

The general proposition, that where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue, is not called in question. If the goods of *A.* are wrongfully taken and sold, it is not disputed that the owner may bring trover against the wrongdoer, or may elect to consider him as his agent, may adopt the sale, and maintain an action for the price; but it is objected, that such general rule will not apply to the present case, on various grounds which have been advanced on the part of the defendants.

Those objections appear to resolve themselves substantially into four. 1st, It has been urged that the transfer in this case being an act, not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party. 2dly, That at all

events in this case such election is taken away, upon the grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would in effect be to affirm a sale completed through a felony, and would give the plaintiff a right of action, arising immediately out of the felony itself. 3dly, That it does not appear, from the facts found in the special verdict, that the money produced by the sale of the stock came to the hands of the present defendants under such circumstances as would constitute it money had and received by the defendants below to the use of the plaintiff; and, lastly, That by the subsequent transactions between the plaintiff and the Bank of England she has lost any right of action against the defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It was urged at the bar, that a lease under a power being void, on account of a non-compliance with the terms of the power, or a lease under the enabling statutes being void, on account of the non-observance of the requisites rendered necessary by those acts, such void lease cannot be set up or confirmed by any act of the lessor; but these instances only prove that acts done to confirm the lease itself are nugatory: and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her whether the right of the transferee to hold the stock be strengthened or not. She is looking only to the right of recovering the purchase money; and if, in seeking to recover that, she does not by her election make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the

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interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that, after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning in any manner, the title of the purchaser of the stock.

As to the second objection, it may be admitted that the civil remedy is in all cases suspended by a felony, where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act. Upon this ground, *Mrs. Keating* would have lost any right of action which she could otherwise have had against *Fauntleroy* for the wrongful sale of her stock, without her authority, by reason of the felony committed by him, as the means of selling the stock. But this principle does not apply to the present case, upon two grounds. 1st, None of the present defendants had any privity or share whatever in the felonious act; there is therefore no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended; they are innocent third persons. And, 2dly, *Fauntleroy*, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of another of the same nature; and the present plaintiff having given to the Bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar, *Dawkes v. Cavanagh, Style*, 346, and *Crosby v. Laing*, 12 *East*, 409. As to the argument, that to affirm this sale is to affirm a felony, that point may be considered

to have been decided in the cause of *Stone v. Marsh*, 6 *Barn. & Cres.* 551, with which decision we entirely concur. Lord *Tenterden*, in giving the judgment of the Court of King's Bench in that case, puts the question (page 565) in so clear a point of view, that it will be better to transcribe his words: — “ It was contended that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or felonious act, and that here the plaintiffs were seeking to ratify the felonious act of *Fauntleroy*, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect; in fact, the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, nor was the transfer, nor the receipt of the money: the felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of England to allow the transfer to be made.” We think, therefore, upon the reasons above given, that this second objection falls to the ground.

But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants; so as to be money received by them to the use of the plaintiff; and the consideration of this objection involves two questions: — First, did the money actually come into the possession of the defendants? Secondly, if it ever were in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of *Fauntleroy*. As to the first point, the special verdict finds expressly, that *Simpson*, the broker, paid the sum

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1834. of 6,013*l.* 2*s.* 6*d.*, being the amount of the sum received from *Tarbutt* — deducting one half of the usual commission — by a cheque payable to *Marsh* and Co. into the hands of *Martin* and Co. to the account of *Marsh* and Co., at the precise time of such payment; therefore there can be no doubt but that it was as much money under their control, as any other money paid in at *Martin* and Co.'s, by any customer under ordinary circumstances. The house of *Marsh* and Co. might have drawn the whole of the balance into their own hands: if the same money had been paid into *Martin* and Co.'s, as the produce of the plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the defendants to the use of the plaintiff. It would not the less be money received by the partners of the firm, because — as found in the special verdict — it was entered in the account as “Cash per *Fauntleroy*,” or because it never appeared in the house-book or any other books of *Marsh* and Co., but only in the pass-book of that firm with *Martin* and Co., or because it never came into the yearly balancing of the house of *Marsh* and Co., or in any other manner into their books. Those several circumstances prove no more than that *Fauntleroy*, one of the partners, deceived the others, by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner *Fauntleroy*, in the subsequent appropriation of the money, affords no answer, after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present defendants had no knowledge that the money was the property of the plaintiff, being perfectly ignorant, as the special verdict finds,

of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at *Martin* and Co.'s.

It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility in a case wherein, if actual knowledge were necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the plaintiff's right to recover, it is argued, that by the agreement into which she entered with the Bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale, with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale.

But it appears to us, that it is sufficient to look at the terms of such agreement, to give an answer to the objection. That agreement expressly reserves to *Mrs. Keating* the right to have recourse either to the Bank or the present defendants for her remedy, as she may be advised. It therefore leaves the question, whether the sale be affirmed or not, completely in uncertainty, until she make her election to have recourse to the one or the other; and the agreement is one which causes no disadvantage to the rights of the defendants, who, if liable, can only be liable once to the payment of the money

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actually received, whether the Bank have in the meantime advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that upon the question which has been proposed to us by your Lordships, *Ann Keating* has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires to have it expressly understood that he fully concurs in the opinion now delivered.

The Judges having given judgment in another case, the following observations were made by the Lord Chancellor:

LORD CHANCELLOR:—I was not present when the Learned Judges gave their opinion in the case of *Marsh and Keating*, which was a case of considerable importance, and on that account was very fit to be brought here, and it was in consequence of that I recommended it should come here when it was before me in the Court of Chancery. The Learned Judges have all agreed in opinion, in support of the judgment below; I therefore move your Lordships, that the judgment be affirmed, but at the same time without costs, in consideration of the importance of the question, and the opinion of the Court below having been in favour of taking the sense of your Lordship's House.

Judgment affirmed, without costs.

Ex parte HETHERINGTON.—In the matter of
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C. of R.
Dec. 20,
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MR. BLIGH for the bankrupt (*Glossop*):—In this case a petition to stay the bankrupt's certificate has been presented by a creditor named *Hetherington*, but only served one day before the day for which it was answered. The present application is for leave to present a cross petition for its allowance on the ground of non-service, and that it may be heard to-morrow.

Where, on a petition to stay the certificate, the bankrupt's solicitor requested delay, and undertook to serve the petition on the bankrupt, the latter cannot afterwards have the petition called on, out of turn, to be dismissed for want of personal service, according to *ex parte Moore*, 1 Gl. & J. 253, and *ex parte Brenchly*, 1 Mont. & Gregg. Dig. 161.

Sir *George Rose*:—In reply to the affidavits filed by the petitioner in support of the petition to stay, the bankrupt has filed an affidavit alleged to be scandalous, and a reference is pending as to that; but for that the petition would have been heard before this, consequently the delay is caused by the bankrupt. Under these circumstances it becomes a question for consideration, whether you can appear, and ask to be heard?

Semble, that the rule, that a bankrupt cannot waive the necessity of personal service of a petition to stay his certificate, does not apply when a professional man is interposed.

Mr. *Bligh*:—The order of reference was improperly obtained, not having been made on the application of the party scandalized. *Ex parte Pelham*, Mont. 209, decides that the party scandalized must apply.

The CHIEF JUDGE:—There certainly is a dictum to that effect by the Vice-Chancellor in *ex parte Pelham* (a), but there is also a dictum the other way by Lord *Eldon*. (b)

(a) *Mont.* 209.

(b) In *ex parte Simpson*, 15 Ves. 476, "I do not think, with reference to this subject of scandal in proceedings, that any application by any person is necessary. The Court ought to take care that

either in a suit or in this proceeding (in bankruptcy) allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject, shall not be put upon the record.

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Sir *George Rose* : — And I always have understood the practice to be, that any person might apply.

The CHIEF JUDGE : — But I am of opinion, that the objection of want of service overrules all questions connected with affidavits. But notice has not been given to the other side. Let notice be given, and renew this application. (a)

Dec. 21.

Mr. *Montagu* and Mr. *Bligh* renewed the application : — The rule always has been, and it is to be hoped always will continue *strictissimi juris*, that a petition to stay the certificate must be personally served on the bankrupt two clear days before that appointed for the hearing; *ex parte Notley*, 1 *Gl. & J.* 63, S. C., 2 *Jac. & W.* 220; *ex parte Kendall*, 1 *Ves. & B.* 544, S. C., 2 *Rose*, 115; *ex parte Coulbourn*, 2 *Rose*, 187; *ex parte Bosanquet*, 1 *Mont. & Gregg*. Dig. 161. So strict is this rule that the bankrupt cannot, by any act of his, waive the necessity of personal service, admitting the receipt of the petition is not a waiver; *ex parte Furnival*, 1 *Gl. & J.* 254: nor is filing affidavits or applying to have the petition advanced; *ex parte Groom*, *Buck*, 40; *ex parte Kendall*, 1 *Ves. & B.* 544; *ex parte Harford*, *Buck*, 38.

The bankrupt might have waited till the petition was called on, when it would be dismissed with costs; *ex parte Hopley*, 2 *Jac. & W.* 222: but he preferred making the present application, that his certificate may be forthwith allowed, following *ex parte Moore*, 1 *Gl. & J.* 253, and *ex parte Breachly*, 1 *Mont. & Gregg*. Dig. 161.

Mr. *Chandless* for the petitioner : — As to the service, the petition was answered on the 29th of November.

(a) In strictness a cross petition was necessary, but it was agreed to waive that form in order to save expence.

On that day a letter was sent to *Braham*, the solicitor to the bankrupt, stating that the petition had been presented, and requesting that a day might be appointed when the bankrupt might be served. On the 5th of December the solicitor to the bankrupt came to *Rawlin's* office, requesting that the hearing might be postponed on account of a domestic affliction; and he wrote a letter, in order to furnish evidence of his request, at the same time he expressly undertook to serve his own client the bankrupt. Under these circumstances it is submitted the application cannot be entertained.

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Mr. *Bligh* in reply (Mr. *Montagu* having left the Court): —

The general rules of practice are not denied; and the question is, whether the bankrupt were personally served two days before, or whether any thing has been done to waive service.

The petitioner was aware of the existence of the rule, and knowing it, and that the bankrupt could not be found, he ought to have applied to substitute service. *Ex parte Harrison*, 1 Gl. & J. 71; *ex parte Hopley*, 2 Jac. & Walk. 222. The letter in question, which asks the bankrupt's own solicitor to serve the petition on him, was dated the 7th, and the petition was answered for the 9th, so that in any event the petition was not served in time.

The CHIEF JUDGE: —

I understand the facts of the case to be as follow: On the 5th, *Braham*, the solicitor to the respondent, called on *Rawlins*, the solicitor to the petitioner, and asked that the petition might stand over on account of a domestic affliction; whereon *Rawlins* requested him to write a

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letter, in order that he might be furnished with evidence of the fact; this letter was accordingly written by *Braham*, and sent on the 6th, on which day *Rawlins* requested *Braham* to serve his (*Braham's*) own client, the bankrupt, which he verbally agreed to do.

As to the general rule there is no doubt. But none of the cited cases apply where the want of service arises from the conduct of the bankrupt or his solicitor.

On the 5th an application for delay was made by the bankrupt's solicitor, by which the petitioner was lulled into security, and moreover the bankrupt's solicitor then gave a verbal undertaking to serve his client.

Under all these circumstances, this is not a case in which the petition ought to be called on, out of its turn, in order to be dismissed.

Sir John Cross :—The first step towards delay was taken by the bankrupt's solicitor. When the respondent asked for a week's delay, did he not give a week more to serve in? If so, he was served in time. I therefore can perceive no reason for granting the present application.

Sir George Rose :—

The Court ever has been, and probably ever will be, indulgent in cases of certificates. The rule is, that the bankrupt must be personally served at least two clear days before the day appointed for the hearing, and that the bankrupt himself cannot waive the necessity for such service. But it is very different when the bankrupt moves to advance the petition, in order to have it dismissed for want of service.

When the petition comes before the Court in regular course, the objection of want of service may be started and will be disposed of. But I would beg to suggest,

that though *ex parte Furnival*, 1 Gl. & J. 254, decides that the bankrupt cannot himself waive the necessity of personal service, and is not bound by admission of other service, yet that is because merchants and traders are not expected to know the rules of practice, and are uninformed of the protection they may be entitled to thereunder, and that it might be very different when a professional man is interposed who is aware of the rules of practice. In this case the solicitor, who knew that the petition must be personally served, undertook so to serve it.

It would have been more regular to have brought on the present question on petition, but the Court has entertained it on motion, such being by arrangement, and to save expences.

Motion dismissed, with costs against the bankrupt, but their payment to be suspended till the hearing of the petition. (a)

(a) On the 12th of January 1834 the petition came on in regular course, and was dismissed, the petitioner not appearing.

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SITTINGS AFTER TRINITY TERM 1834.

Ex parte MUNK.—In the matter of MUNK.

C. of R.
June 23,
1834.

A commission held, under the circumstances, not supersedeable, though there were not the requisites to support it.

THIS was a petition to supersede, presented by the bankrupt.

The commission issued in 1824, and was subsequently transferred to *C. F. Williams* esq., by whom Mr. *James Clark* was appointed official assignee. In May 1829 the bankrupt brought an action against the assignee and messenger, in which he was nonsuited. In October 1827 he presented a petition to supersede, which was dismissed with costs, which were not paid. In February 1831 he presented another petition to supersede or for an issue, which was dismissed with costs, which were not paid.

In January 1833 an action was brought, in order to try the validity of the commission, in which the bankrupt was plaintiff, and the official assignee defendant, to recover rent received by the latter. A verdict was found in favour of the petitioner, on the ground of there being no good petitioning creditor's debt.

In Trinity Term following a new trial was ordered.

The case was argued for a new trial on the following case, stated for the opinion of the Court, as reported in 10 *Bing.* 102.

This was an action brought to recover the sum of 80*l.* for money had and received by the defendant to the plaintiff's use. A commission of bankrupt issued against the plaintiff, dated 1824, and the defendant was afterwards appointed official assignee under the commission. The 80*l.* claimed in this action was received from the tenant of the plaintiff's estate by the defendant as official assignee, and as such he signed the receipt for the amount. The plaintiff had applied to a commissioner of

bankrupt to appoint an official assignee to investigate if any debt were due to the petitioning creditor, to enable him, the plaintiff, to dispute the validity of the commission. It was agreed to be taken as fact, for the purpose of this case, that the plaintiff was not a bankrupt at the time the commission of bankrupt issued. The question for the opinion of the Court was, first, whether the defendant were liable in this action, the money sought to be recovered having been received by him in his character of official assignee; and, secondly, whether the application made by the plaintiff as above would preclude him from maintaining the action.

The cause was again tried on the 5th of December, when the jury again found that there was not a good petitioning creditor's debt. The bankrupt also brought an action in the Exchequer against the tenant of the same estate, to recover rent due subsequently to that received by the official assignee; the tenant interpleaded, and finally an order was made for payment out of court to the bankrupt of the rent.

In November 1833 the bankrupt petitioned the Court of Review to supersede, but the hearing was stayed till he had cleared his contempt by paying the costs of the former petitions.

This was another petition to supersede.

The two creditors' assignees consented to the supersedeas, but the official assignee refused to consent.

Sir George Rose:—Why did the official assignee defend the action without first coming to this Court to receive directions how he should act?

Mr. Bacon:—He took the advice of the commissioners.

Mr. Swanston for the petition:—There have been

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two verdicts against the commission, which is invalid, for want of a petitioning creditor's debt. The assignees are convinced the commission cannot be supported, and consent to the supersedeas; the official assignee alone resists, as he before defended the action, in which he was wrong, as the verdict against him proves. It always was of course, before the Lord Chancellor, to supersede after verdicts against the commission.

Mr. Bacon for the official assignee.

Per Curiam : —

This commission issued ten years ago. Two petitions to supersede by the bankrupt have been dismissed, and the hearing of a third stayed, and now he petitions, for the fourth time, on the ground of a verdict against the commission in an action against an official assignee who was appointed on his special application; and on the strength of this verdict in his favour he comes to supersede, without stating any thing to enable the Court to judge of the propriety of the action or of the verdict. It has been urged this Court must supersede after a verdict against the commission. Such is not the case. A verdict is only a strong circumstance of inducement. Even putting the verdict here as a judgment, and therefore conclusive, yet, after ten years have elapsed, after the active acquiescence of the bankrupt in procuring the appointment of an official assignee, and after the dismissal of the former petitions, this Court would do wrong to encourage the present application.

This petition must be dismissed, and, though the petitioner be a bankrupt, with costs to the official assignee.

Petition dismissed, with costs.

Ex parte BALDWIN.—In the matter of DUNCAN
NEIL SMITH.

C. of R.
June 23,
1834.

THIS was a petition to reverse the decision of a subdivision court, which had expunged a proof; and a cross petition to confirm the decision.

The Court can reverse the decision of a Subdivision Court on a matter of fact as to expunging a proof, that not being within sect. 30 of 1 & 2 W. 4, c. 56.

It was presented under 6 Geo. 4, c. 16, s. 60, which gives to commissioners power to expunge, but expressly reserves to each party a right to petition against the determination of the commissioners.

Mr. *J. Russell* and Mr. *Bethell*, for the creditors who had applied to expunge, objected that the Court had not jurisdiction.

The 1 & 2 W. 4, c. 56, s. 30, enacts, “that any one of the said commissioners, if he think fit, may adjourn the examination of a proof of debt to be heard before a subdivision court, which said court shall proceed with such examination, and finally and without any appeal, except upon matters of law or equity, or the refusal or the admission of evidence, shall determine upon such proof of debts.”

This appeal is on a question of fact, not of law or equity, and therefore cannot be entertained. [The CHIEF JUDGE:—That section refers to the admission or rejection of proofs. This is a question as to expunging a proof: is that within the section?] If section 30 relate to proofs only, and have no reference to cases of expunging, then this, which was an expunging, was done *coram non judice*: but the other side have acquiesced in allowing that it was *coram judice*, and now seek to appeal as to a matter of fact, which they cannot do.

1834. Mr. *Swanston*, Mr. *Montagu*, Mr. *Keene*, and Mr. *E. Chitty*, *contra*, were stopped by the Court.

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Ex parte
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of
SMITH.

Per Curiam : —

The objection to the jurisdiction is not valid. The 30th section of the 1 & 2 W. 4. is confined to cases of *proof*, and does not relate to applications to *expunge*, which are made under section 60 of 6 Geo. 4, c. 16.

That this question went before a subdivision court does not prove it to have been adjourned under section 30. The 7th section of 1 & 2 W. 4. enacts, that it shall be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by any act or acts of parliament now in force vested in commissioners of bankrupt. Section 60 of 6 Geo. 4, c. 16, authorizes commissioners to expunge a proof. The result of the two sections is, that any one or more of the commissioners of the Court of Bankruptcy may expunge a proof. Any one, any three, or all six, might sit together for that purpose. As any one might act, the fact of his being assisted by two of his colleagues can make no difference.

The object of the legislature in this 30th clause appears to have been to provide for a prompt decision in questions of proof; because, while appeals were pending to the Court, the commissioner could not proceed in the administration of the estate; therefore an instant adjournment to a subdivision court was provided, and the appeal confined to points of law, equity, or evidence; and section 31 provides for the setting apart a sum to answer any dividend in the meanwhile.

Section 30 does not apply to cases of expunging which may happen to be referred to a subdivision court, but only to cases of proof so referred; we are consequently bound to hear this petition, no express words having been used to deprive us of jurisdiction in the present case.

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Objection overruled.

Ex parte BALDWIN.—In the matter of DUNCAN
NEIL SMITH.

C. of R.
June 24,
1834.

THIS was an appeal from a subdivision court as to expunging a proof. See *ante*, page 615. Mr. *Swanston* and Mr. *Montagu* having concluded the case on affidavit, the Court declared that there was not sufficient evidence to overrule the decision below; whereon Mr. *Swanston* and Mr. *Montagu* for the petitioner asked that a *vivâ voce* examination might be had.

An application to examine *vivâ voce* should be made before the petition is heard on affidavit.

Ex parte
Armsby, 2 Dea.
& Ch. 120, and
Anon., 2 Dea.
& Ch. 140,
corrected.

Per Curiam :— You are now too late; the application should have been made before the case was heard on affidavit; the Court cannot permit a party to conclude his case on affidavit, and when he finds the Court against him, then to have a *vivâ voce* examination.

Mr. *Swanston* and Mr. *Montagu* :— The practice is to hear first on affidavit, and then, if necessary, to have a *vivâ voce* examination, as was settled in *ex parte Armsby*, 2 Dea. & Ch. 120, where an application was made to issue process for a *vivâ voce* examination in the first instance, but the Court refused until the case had first been heard on affidavits, when they would be more competent

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to decide whether such an examination were necessary and the same was held in *Anon.*, 2 *Dea. & Ch.* 140.

Per Curiam : — An application to have witnesses examined *vivâ voce* may be made at any time before the hearing ; such is the general rule of practice, which, like all other general rules, must sometimes give way to circumstances. The cases referred to are not reported sufficiently at length ; the Court did not lay down any general rule, but the decisions were in consequence of peculiar circumstances which arose in those cases.

Mr. *Bethell* (*amicus Curie*) : — Having been counsel in *ex parte Armsby* in the matter of *Lord*, I am enabled to state that the facts of that case were as follow : — Numerous and long affidavits were filed on both sides, which were contradictory, and a motion was made before the hearing, on the ground of this contradiction, that an issue might be had at which the witnesses would be examined *vivâ voce*, instead of the case being heard on petition and affidavit ; but the Court said, as the case had gone so far, it would not then order an issue, but would first hear the petition and affidavits ; and if any contradiction appeared on the evidence, the Court would then order an issue.

The CHIEF JUDGE : — That is my impression of what took place ; the expence to which the parties had already been put by the affidavits also influenced me.

Ex parte JARVIS, one, &c. — In the matter of
ELLIOT.

C. of R.
July 4,
1834.

MR. SWANSTON: — On the 26th of June a country fiat issued on the petition of *Thomas Hazelwood* and *Thomas Turner*. This fiat is not yet opened.

Unopened fiat amended to agree with docket papers.

The solicitor, in making out the bond and affidavit, described them as *Thomas Hazelwood* of Withybrooke, in the county of Warwick, farmer and grazier, and *Thomas Turner* his partner, meaning, by "his partner," that he was his partner in this particular debt, that is, the debt was owing to them jointly. The office thus described the petitioning creditors in the fiat:—" *Thomas Hazelwood* and *Thomas Turner* of Withybrooke, in the county of Warwick, farmers and graziers, and partners."

This is a petition that the fiat might be amended, altering the description to that in the docket papers.

Ordered accordingly. (a)

Ex parte DUNSTAN. — In the matter of
DUNSTAN.

C. of R.
July 5,
1834.

A CREDITOR had given a power of attorney to *A. B.* to sign the bankrupt's certificate, which he signed accordingly. When the certificate came to the office, it was discovered that there was no affidavit verifying the

Semble, that a creditor who has signed the certificate by attorney, cannot stop the certificate by subsequently withholding an affidavit verifying his signature to the power.

(a) It will be observed that the error arose in the office, and that there were the docket papers, which were correct, to amend by.

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Ex parte
DUNSTAN.In the matter
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execution of the power of attorney, whereon the power was sent back to the creditor, accompanied with a draft of the requisite affidavit; these the creditor now refused to return, and endeavoured to make terms. This was a petition for an order on the creditor to deliver up the power and affidavit, or that the certificate might pass without the signature of the creditor.

The creditor was served, but did not appear.

Mr. *Prendergast* for the petition.

Ordered, That the certificate be received in the office, and remain there, and notice be given to the creditor of this order, and that he may oppose the allowance of the certificate if he think fit; at the end of twenty-one days the petitioner to be at liberty to apply again to the Court, and the petition to stand over in meantime.

C. of R.
July 5,
1834.

A mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption.

Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees.

Ex parte TUFFNELL.—In the matter of WATTS.

WATTS, being mortgagee of an estate under a demise by way of mortgage for 500 years, deposited the mortgage deed with *Tuffnell*, in order to give him an equitable mortgage for 800*l.* *Watts* afterwards purchased the equity of redemption.

Watts became bankrupt.

Mr. *Beaumont*: — This is a petition by *Tuffnell*, praying he may be declared equitable mortgagee, and for a sale, not of the mortgage term only, but of the equity of redemption which had been purchased by *Watts*, as the deposit of title-deeds is not a conveyance, but a transaction giving a lien for the full amount of the sum

intended to be secured thereby, and that the re-delivery of the deeds cannot be enforced until the whole sum so secured be paid.

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Per Curiam : — Take the usual order ; that is, for a sale of the property in the mortgage security contained. If the assignees do not take the equity of redemption and pay off *Tuffnell*, there is no doubt he may put up for sale the whole interest of the bankrupt in the premises. In that case the assignees will join in the conveyance to the purchaser.

Ex parte **APLE.** — In the matter of **FRIEND.**

C. of R.
July 11,
1834.

MR. MONTAGU applied for the usual order in the case of equitable mortgages. The mortgage was of an equitable estate, but there was a regular mortgage deed.

A legal mortgage of an equitable estate is within Lord Loughborough's general order.

Per Curiam : — This is a legal mortgage of an equitable estate, which the commissioner can order to be sold under Lord *Loughborough's* order. What necessity is there to apply to this Court?

Mr. Sturgeon (who consented for the assignees) said, many persons entertained doubts upon the subject.

Per Curiam : — Is there any ground for the doubt? However, as the petition has been presented, the order may be made.

Ordered.

C. of R.
July 11,
1834.

Ex parte JOHNSTON, on behalf of the Hibernian Joint Stock Company. — In the matter of COHEN.

Special case sent from commissioner must be brought on upon petition.

Notice of the dishonour of a bill must be sent to the house of a bankrupt indorser, though he be not there.

The holder must use due diligence to give notice; the effect thereof is another thing.

Notice must be given to the messenger, if in possession.

Quære, As to the necessity of giving notice to the assignees?

IN this case the commissioner did not give any judgment, but directed the facts to be set forth in a special case, for the decision of the Court of Review.

On a former day Mr. *Lloyd* applied to the Court for direction how to proceed to have the case set down for argument, this being the first instance in which the Court of Review had thus been called on for its judgment on a special case, which had been prepared in pursuance of the 1 & 2 W. 4, c. 56, s. 2, which enacts, "that all such matters to be heard and determined in the said Court of Review shall be brought on by way of petition, motion, or *special case*," &c. The Court directed that the special case should be stated on a petition, adding the fact, that the commissioner had directed a special case, and praying the judgment of the Court thereon; and that such petition should be then answered, filed, and served as usual.

This day the case came on for argument. The following are the facts as stated in the

SPECIAL CASE.

In the year 1832, and for some time previously, the bankrupt *Cohen* carried on the trade of a jeweller, at a certain house and shop situate at 14, Lower Ormond Quay, in the City of Dublin; and when in London, from time to time he conducted the same trade in Bury Street, St. Mary Axe. The Hibernian Joint Stock Loan Company is a joint stock company duly authorized by act of parliament to sue and be sued in the name of their secretary, and carrying on the business of bankers in Dublin.

The bankrupt had a discount account with this company, and upon the 24th of January 1833 the company held various bills of exchange and promissory notes, all of which had been duly discounted by the company for account of the bankrupt, and had been duly indorsed and delivered by him to the company.

On the 24th of January 1833 the bankrupt quitted Dublin and came to London, leaving at that time his house and shop in the care of his wife and clerk, who resided therein.

On the 6th February 1833 a fiat was awarded against the bankrupt, by the name and description of *Joseph Wolfe Cohen* of Lower Ormond Quay, in the city of Dublin, and of Bury Street, St. Mary Axe, in the city of London, wholesale jeweller and factor, dealer and chapman, under which, on the 8th of the same month, he was duly declared a bankrupt; and the same was advertised in the London Gazette of that night; and *Patrick Johnston* was duly appointed the official assignee of his estate and effects.

The messenger under the fiat was sent to Dublin to take possession of the bankrupt's house, shop, and property, where he arrived upon the 11th of February, and remained there until the 13th of March following, during which time he superintended the removal of the bankrupt's property from Dublin to London. The shop during that time continued closed, and no business was carried on upon the premises during the above period; but the house, to which the shop was attached, was open, and various messages and letters were received by the messenger relating to the bankrupt's affairs; and, upon the messenger quitting possession of the premises, he left the same in the occupation of the wife of the bankrupt and his family. The Hibernian Loan Company had, however, no notice that the messenger was

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so in possession, Upon the 21st of February, *Hart, Joseph, and King* were appointed creditors' assignees; but the company had no notice that they had been so appointed. The bankrupt did not return to Dublin until after the 12th of April 1833, when he passed his last examination under the fiat. All the bills of exchange and promissory notes so discounted by the Hibernian Loan Company were drawn by the bankrupt, and fell due after the bankruptcy. They were particularly described in a schedule contained in the special case, and were twenty-nine in number. Of these bills and notes seven were drawn and made respectively for the accommodation of the bankrupt, and nine were accepted and made respectively for value. Of those accepted for value one bill for 164*l.* 6*s.* 3*d.* fell due upon the 12th of February 1833, one for 100*l.* upon the 28th of February 1833, one for 18*l.* upon the 3d of March 1833, one for 197*l.* 13*s.* 1*d.* upon the 11th of March 1833; and the others fell due at various dates after the 13th of March 1833. Among these was one for 77*l.* 10*s.* 6*d.*, one for 14*l.* 7*s.* 1*d.*, and another for 32*l.* 8*s.* 3*d.* Eight other bills and notes did not appear, either by the bankrupt's books or by his balance sheets, to have been given for value; and the only evidence to prove that they were so given for value was a letter from the bankrupt to the solicitor for the fiat, stating, that, to the best of his knowledge, he, the bankrupt, gave value for them. Of these last-mentioned bills two fell due upon the 10th February 1833, one upon the 26th February 1833, one upon the 4th March 1833, one upon the 10th March 1833, and the others after the 13th March 1833. Two other bills were in the like predicament; one of these fell due upon the 6th of February 1833, and the other upon the 16th March 1833. The Hibernian Joint Stock Loan Company

tendered a proof for all these bills of exchange and notes; but as no evidence was adduced by the company that any notice of the dishonour of the bills or notes had been left at the bankrupt's house, or given to the assignees or solicitor to the fiat, and the objection of the want of notice having been taken by the assignees and solicitor to the fiat, the commissioner refused to allow any one of the bills or notes to be proved; and he directed a special case to be stated for the opinion of the Court of Review as to the following question; namely, Whether all or any of the said bills of exchange and promissory notes were, under the circumstances stated, proveable under the fiat?

The petition prayed that the Court would be pleased to take the special case into consideration, and make such order thereupon as should seem right and the justice of the case might require.

The objection to the proof of the seven bills which were drawn for the accommodation of the bankrupt was waived by the counsel for the respondents.

Mr. Lloyd for the petition:—

1st, As to the four bills for value.

These four bills fell due while the messenger was in possession, which was from the 11th of February to the 13th of March, during which period the bankrupt was absent from the house, so that there was no one to whom notice could be given.

But it is contended that the bankruptcy dispensed with the necessity for notice, as was held in *ex parte Solarte*, 2 Dea. & Ch. 261 (a), where the Chief Judge said, "Although no notice of the dishonour was given, yet, as they fell due after the bankruptcy of Messrs. Knowles, no notice was requisite."

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(a) See the report of this case, *postea*.

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The CHIEF JUDGE:—In that case no objection of want of notice was taken by the assignees when before the commissioners, nor was it adverted to in any of the affidavits, but was urged in argument in this Court for the first time; and I for one held, that, under these circumstances, if the assignees intended to insist on the want of notice, they should have intimated that to the other side. In that case the acceptor as well as the drawer became bankrupt; and the Court said, that therefore no injury had arisen from want of notice, and that though the want of notice would have been fatal at law, yet that this Court would not allow such an objection to prevail, coming from assignees, and urged here on the sudden, and for the first time. This should be stated in relief of the reporters; for, not being prominent in the discussion, I might have passed it over shortly, and have been less explicit on that point than on the other points, so that what I said might have been missed, and I therefore may be responsible in some measure for the mistake; but I certainly did advert to these points in my judgment.

Mr. Lloyd:—

Ex parte Moline, 19 Ves. 216, may perhaps be cited by the other side; but all that case decided was, that before the choice of assignees notice to the bankrupt is enough; but it does not decide that such notice is necessary.

In *Rohde v. Procter*, 4 Barn. & Cres. 517, it was decided, that, where the drawer becomes bankrupt and absconds, notice of the dishonour must be given to the messenger in possession. Now, even though that case should be held to apply to the bills which became due while the messenger was in possession, yet it would not apply to the others, as Mr. Justice Bayley, in giving

the judgment of the Court, says (p. 523), " It is not necessary to decide in this case whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to find out his assignees ; nor is it necessary to say what would be the case if such a party's house were shut up, and there were no means afforded there of discovering him or his representatives ; for in this case the bankrupt's house continued open. The agent of his representatives, the messenger, who was also in some degree his representative, was there ; and a notice there would have reached the assignees, and have given them the power of considering whether they should have taken any and what steps against *Lacklan*. In a very excellent modern publication on the law of bills of exchange, combining the Scotch and English law upon the subject, *Thompson*, 535, it is laid down, that, in case of the bankruptcy of the drawer or of an indorser, notice must still be given to the bankrupt, or to the trustee vested with his estate for behoof of his creditors ; and he refers, amongst other decisions, to the case *ex parte Moline*. (a) Whether this be universally and in all cases true it is not now necessary to decide ; all the present case requires is this, that where the bankrupt's house continues open, and an agent of the assignees there, notice is essential ; and a neglect to give it bars the holder's claims against the bankrupt's estate."

Mr. Justice *Bayley* speaks of the agent being present ; but, in the case now before the Court, what " agent " was in the house after the messenger had quitted possession ? No person was there but the wife. Now the wife is not the agent of the husband to receive notice in such matters of business. But it is also contended

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that the messenger is neither the agent of the bankrupt nor of the assignees; he is an officer of the Court only, not able to receive notices; his duty is ministerial, viz. to seize and preserve property.

In *Bayley* on Bills, 284, the rule is thus laid down: "If a party entitled to notice become bankrupt, but assignees are not chosen, notice to him is sufficient; there need not be any further notice when assignees are chosen. But if he have absconded, and assignees be chosen, and the holder know it, he must give notice to the assignees, especially if the bankrupt's house be still open, and the messenger under the commission be in possession of it."

Such is the fair rule. If assignees be chosen, and the holder know it, then he must give them notice. In the case now before the Court assignees were not chosen, and the bankrupt had absconded, which rendered it impossible to give him notice.

Sir *John Cross*:—The word used in the case is not "absconded," but "quitted." The case does not allege that the company had no notice that an official assignee had been appointed.

Mr. *Lloyd*:—As the petition is silent, the contrary is to be presumed. *Rohde v. Procter*, 4 *Barn. & Cres.* 517, is not a case to be carried any further, and is not a precedent, save in a case quite *quatuor pedibus*.

The CHIEF JUDGE:—The question is, whether due diligence have been used? What is due diligence may vary in each case. Whether the result of such due diligence were that the parties had notice is quite another thing. *Bayley* on Bills, page 286, says, "the drawer of a bill and every indorser of a bill or note is *prima*

facie to be presumed entitled to bring an action on paying it, therefore entitled to insist on a want of notice or on a neglect to make a proper presentment; but the contrary may be proved; and the representative of such drawer, &c., in case of death, bankruptcy, &c., stands in his place, and is equally entitled to notice."

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Mr. Lloyd: —

In *Rohde v. Procter*, 4 *Barn. & Cres.* 517, allusion is made to Scotch law. In *Bell's* Scotch Law several cases are cited, none of which bear him out in the proposition laid down. In the recent decisions on the French code no such doctrine as that contended for has obtained.

Up to a certain time it was indisputably law, that the bankruptcy of the drawer dispensed with the necessity of notice. Such was the opinion of Lord *Thurlow*, as appears from *Smith v. Lewis*, Bro. C. C. 1. In *Henley's* Bankrupt Laws, page 132 (edit. of 1825), reference is made to this case, and it is added, "but this has been repeatedly overruled, and it has been decided, that neither the bankruptcy nor the known insolvency of the party constitute any excuse for the neglect to give due notice of non-acceptance or non-payment." But the cases cited in support do not bear out the proposition, that Lord *Thurlow's* judgment has been overruled.

2d, As to the bills which, though given for value, import to be accommodation bills.

It was held in *Sharpe v. Bailey*, 9 *Barn. & Cres.* 44, that when the drawer of a bill made it payable at his own house, the jury might fairly infer it was an accommodation bill, which rendered it unnecessary to give notice of its non-payment to the acceptor.

Mr. *Shee*, for the assignees, was stopped by the Court.

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The CHIEF JUDGE:—

If Lord *Eldon* (a) had not conceived that some notice was requisite, he would not have decided that notice to the bankrupt was sufficient; he would have said “no notice is necessary.”

There may be circumstances, such as the bankrupt absconding and shutting up his shop, and there being no assignees elected, in which, as notice could not be given, it might be open to argue that it might be dispensed with. In this case some person was constantly on the premises.

The assignees admitting, that, as to seven of the bills, no assets of the bankrupt were ever in the hands of the acceptor, the order for proof on those is of course. The question is as to the other bills, all of which became due after the bankruptcy,—some before the messenger entered, some while he was in possession, and others after the bankrupt had returned, but all while the wife and family of the bankrupt were there, to some of whom notice of the dishonour might therefore have been given.

I am not inclined to carry the principle of *Rohde v. Procter, & Barn. & Cres.* 517, any further; but without doing so, it may be decided that the other bills are not proveable. The rule requires notice to be given to those who would be entitled to recover over: those persons are here the assignees.

Ex parte Moline, 19 *Ves.* 216, decided that notice to the bankrupt before the choice of assignees was good, as he represented his estate till they were chosen. *Rohde v. Procter, & Barn. & Cres.* 517, decided that on the bankruptcy of the drawer—the messenger being in

(a) In *ex parte Moline*, 19 *Ves.* 216.

possession — due diligence must be used, and notice left at his residence. In that case the bankrupt had absconded, and the messenger was in possession. In the present case there is no evidence that the bankrupt absconded. So far as appearances went, indeed, before the messenger came down, the business was carrying on as usual. When the messenger did come down, *Rohde v. Procter*, 4 *Barn. & Cres.* 517, decides that notice should be given to him in that case. Baron *Bayley* says, “It is not necessary to decide in this case, whether, in the event of the bankruptcy of a party entitled to notice, the holder is bound to endeavour to find out his assignees; nor is it necessary to say what would be the case if such a party’s house were shut up, and there were no means afforded there of discovering him or his representatives, for in this case the bankrupt’s house continued open; the agent of his representatives, the messenger, who was also in some degree his representative, was there, and a notice there would have reached the assignees.” Therefore, while the messenger was in possession, notice should have been given to him. It is said, the parties did not know that the messenger was in possession: that creates no difference; if they had gone or sent to the house, the messenger would have known the fact, and have sent notice to the proper parties; but they took no pains whatever to give notice, and therefore are not entitled to prove. It has been argued, that notice could not have been given after the departure of the messenger, as the wife was not an agent to receive such notices; but here again the general principle applies, viz. that due diligence should be used. The parties never went to the house, never sent any manner of notice; if they had, and then discovered that a bankruptcy had taken place, the question would have arisen

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as to the necessity of finding the assignees and giving notice to them, a question left undecided by *Rohde v. Procter*, 4 *Barn. & Cres.* 517. But instead of using due diligence, they used none at all; the consequence is, that in the absence of notice, either to the bankrupt or his assignees, these bills are not proveable. Some of the bills were drawn by the bankrupt, or at his procuration, and made payable at his house, and it is said these were not for value, and consequently, according to *Sharpe v. Bayley*, 9 *Barn. & Cres.* 44, it may be inferred that these were accommodation bills, and that no notice of dishonour was necessary. It is not shown that the bills were presented at the house, nor was that indeed necessary; the party was personally liable wherever he might be, whether at Dublin, at Belfast, or elsewhere, nor is it shown that any thing tantamount to notice was given.

It was argued that certain of the bills were given for value, though that does not appear either by the bankrupt's books or by his balance sheets. The cases of *Highmore v. Primrose*, 5 *Maule & Sel.* 65, and *Friddy v. Henbrey*, 1 *Barn. & Cres.* 674, show, that, as between the drawer and acceptor, on a bill expressed to be for value, it is presumed to be value received by the drawee, and an action of debt is maintainable. The petitioner, in order to succeed in proving that no notice was necessary, must prove that no value or assets were in the hand of the drawee. This must be proved negatively by the holder, which has not been done.

As to the other bills, we have no facts from which to draw any inference that they were mere accommodation bills, nor can we infer that any thing tantamount to notice was given: the consequence is, that the decision as to these eight bills must follow that as to the others. This petition must be dismissed.

Sir *John Cross* : —

As to the eight bills, the holder not having proved them to be accommodation bills, the proof as to them must be rejected.

As to the other bills, the questions as to the time when due, or who was then in the house, do not appear to me to be material facts.

It has been contended, that the bankruptcy prevents the necessity of giving any notice at all. Such is not law; the authorities have established the rule requiring notice. It has been urged, that assuming notice in general to be necessary, yet here it could not be given, as the bankrupt had absconded. The special case does not so state. He was indeed absent from his house, but what of that?

Sir *George Rose* : —

The bankrupt having domiciled some of the bills at his own house is a strong circumstance towards proving them to be accommodation bills; but the special case finds otherwise. They are therefore not proveable. My opinion, however, is, that the being so domiciled does not dispense with the necessity of notice of dishonour to the drawer. Upon the abstract question, how far, on the bankruptcy of a drawer of a bill, it is necessary for the holder to give notice of its dishonour, it appears to me that *ex parte Rohde, Mont. & Mac.* 430, settles the point.

As to the necessity of notice to the assignees. Assignees under a fiat have no higher title than any other assignees. Suppose assignees of a trader of his property, on trust to pay his debts, could they refuse payment because notice of dishonour had not been given to them? Surely not. What right have assignees under a bankruptcy to such a notice? Convenience has been men-

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tioned. *Ex parte Rohde, Mont. & Mac.* 430, refers to that convenience, and it appears to have been considered as entitled to some weight.

Petition dismissed, but as the Commissioners directed the point to be laid before the Court, costs of all parties out of the estate.

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July 18,
1834. (a)

Ex parte WHALLEY.—In the matter of
WHALLEY.

Solicitor allowed to take affidavits off the file to attend action therewith, undertaking to return them in the same state.

A PETITION to supersede, presented by the bankrupt, had been dismissed, because an action was pending by the bankrupt. The plaintiff's attorney now deposed, that the affidavits filed in reply to the petition were material to the plaintiff's cause.

Mr. *Ayrton* moved that these affidavits might be delivered to the attorney of the plaintiff, the bankrupt, to be produced at the trial, which was

Ordered, on the attorney putting office copies on the file in the meantime, and undertaking to return the originals in their present state. (b)

(a) This was a sitting before Sir *George Rose* alone, to take motions, &c. from the bankrupt office should go from London with the affidavits. The course pursued, however, obviated the expence which that would have incurred.

(b) It had been suggested, that it was necessary that an officer

Ex parte BROADBENT.—In the matter of
BORRON.

C. of R.
July 22,
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IN March 1829 certain coal mines were leased to the bankrupt and others for thirty years, to hold as tenants in common, and were worked by them in partnership.

The bankrupt borrowed 1,200*l.* of the petitioner, to secure which the bankrupt gave his bond, and deposited an attested copy of the above lease, accompanying the deposit with the following memorandum :

“ I do hereby acknowledge that I have deposited with you an attested copy of a lease from *William Lawton* esq. to *J. S.*, *H. D. B.*, *J. A. B.*, *J. C.*, and *C. A.*, of certain coal mines in the county of Stafford, which said lease is so deposited with you as a collateral security for further guaranteeing and securing to you the sum of 1,200*l.*, which I have borrowed from you upon my bond, with all interest owing thereon. And I hereby declare that the aforesaid lease so deposited shall, so long as the said 1,200*l.* and interest be due and unpaid, give you a full right and power to take and demand from my said partners in the aforesaid lease so much of my proportion of the profits in the said coal mines, together with my proportion of the stock of coals, canel, or slack, utensils, implements, or other property belonging to the said company of lessees, as will at all times pay you the interest on the said loan, or principal sum after being demanded, according to the tenor of the aforesaid bond, whenever the same shall be behind and unpaid. And I hereby further agree and engage, whenever required so to do, to sign and execute a legal assignment of all my interest and property in the aforesaid coal concern to you so long as the aforesaid sum is unpaid. Dated this 1st of May 1830. *J. A. Borron.*”

A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share; a partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger. Held, the Court could not make the usual order for sale, &c., as the partnership accounts must first be taken, which this Court has no jurisdiction to do, and the case was not free from doubt. *Cross, J.*, dissenting.

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On the 9th of January 1834 a fiat issued against
Borron.

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On the 11th of January a notice was sent to the other partners, claiming for the petitioner all benefit in the bankrupt's share in the colliery. The petition prayed that the petitioner might be declared equitable mortgagee of the bankrupt's share of the premises and profits.

One of the clauses of the agreement under which the parties worked the mines was, "That if any of the said parties thereto, or the representatives of any of them, should be desirous to sell and dispose of his or their share and interest in the said concern, the other parties interested in the said concern should have the option and preference of purchasing and having such share and interest, at such price or sum of money as should be agreed upon between them and the party disposing of such share and interest."

Mr. G. Richards for the petition:—

In this case the deed deposited is an attested copy only of the lease; but if that create any difficulty, the petitioner falls back on the written memorandum, which entitles to an assignment of all the interest which the bankrupt had in or under the lease. Suppose the petitioner had an actual assignment of the interest in the lease, might she not bring ejectment, being a purchaser for a valuable consideration, without notice? [*Sir George Rose*:—Perhaps she might at law, but an injunction would lie to restrain the action. A purchaser of a leasehold interest in a coal mine has, *ex vi termini*, notice of a partnership, &c.] If the petitioner have no right as equitable assignee of this share in the lease, what right do the assignees under the fiat possess? If the latter can have any right in them as assignees, why may

not the petitioner? [Sir *George Rose*: — If we declare the petitioner equitable mortgagee of this share of the partnership interest, the partnership is disrupted, and the partnership account must be forthwith taken. If the share belong to the assignees, things remain in *statu quo*, and the state of the accounts may be deliberately arrived at. But the difficulty is, how can this Court take the partnership accounts?] If the assignees must take the account, at any rate the petition may stand over till that has been done. The petitioner asks a declaration from the Court, that she is equitable mortgagee; that will give her a right to take that account, either here or elsewhere, a right she does not at present possess.

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Mr. *Swanston* and Mr. *K. Parker* for the assignees: — The petitioner prays this Court to declare that she is an equitable mortgagee of a share of a partnership, on which a right of pre-emption is reserved. But a partner cannot give a stranger such an interest in the partnership without the assent of the other partners. Even if that could be done in general, the right of pre-emption would prevent it in the present case. Besides, this is an attempt to create an equitable mortgage by deposit of an attested copy of a deed: no precedent can be produced where this has been done. Moreover, this being a conveyance of the whole of a trader's property, is an act of bankruptcy, and invalid. Supposing all these objections got over, yet the other partners are not before the Court, and if they were, yet this being a Court of limited jurisdiction can make no such declaration as against them. The partnership accounts must be taken, which this Court cannot take.

Mr. *Richards* in reply: — We call on the Court to declare, whether or not we have any lien on the share.

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The order to sell the interest of the petitioner, whatever that interest may be, can do no injury to any person. As to the right to pre-emption, it cannot affect the mortgagee, who was totally ignorant of its existence, and who is therefore a purchaser for valuable consideration without notice.

The CHIEF JUDGE :—

In general, a partner in a mining concern is considered as a sort of shareholder, rather than a partner in the common acceptation of the term ; but the proviso for pre-emption in this case prevents that free transfer of the share which otherwise could take place. The question here is, whether, granting the bankrupt could, in the face of the clause for pre-emption, dispose of his one fifth share of the partnership assets, after payment of the partnership debts, yet can this Court, on this occasion, take the partnership account ? In cases of mines, bankruptcy is not, as in other cases, a dissolution of the peculiar kind of partnership which exists. The difficulty which exists is the inability of this Court to take the account. It has been said, in argument, that this Court may order the sale of the petitioner's interest, be that what it may ; but we could only order a sale of the bankrupt's interest, subject to an account with strangers, to be taken in equity. This, in effect, would be putting up for sale what is not saleable, viz. a suit in equity. If, on the other hand, we leave it to the assignees to take the account, then the bankrupt's share in the property becomes payable to them, and on that share the petitioner's claim would still attach ; for in dismissing this petition the Court does not declare that the transaction is not a valid equitable mortgage.

I should have been glad to interpose, as our refusal drives the petitioner to a more dilatory and expensive

tribunal ; but as no precedent has been produced for the order asked, I think we ought not. Even if we did interfere, we could only, under the circumstances of this case, declare this a good equitable mortgage. But the mere declaration of right is not the subject matter of the jurisdiction of this Court ; the declaration is a mere step towards ordering a sale, which sale is itself made in order to ascertain the amount of proof.

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Sir John Cross : —

This is a case, the decision of which may involve interests of great magnitude, and requiring much consideration ; I am not therefore now prepared to give any judgment.

The respondents object, that this is a Court of limited jurisdiction, and that there is no precedent for the order asked. I do not agree that our jurisdiction is more limited than that of any other court ; it is full and ample in cases where we do possess it, and no more can be said of any other tribunal. As to want of precedents, the absence of a case on all fours with the present is not conclusive against the petitioner ; there is no precedent either way ; consequently we must refer to principle. The property is a bankrupt's, the petitioner a creditor, the respondents the assignees ; we therefore have jurisdiction. It has been said that the amount of the petitioner's interest must be first ascertained : that might be done with facility ; references to commissioners to ascertain value are made every day. In *ex parte Prescott* (a) the Court decreed the petitioner to have a lien on certain return proceeds, and did not delay the declaration that the petitioner had a lien till after the value of such return proceeds had been ascertained. Why

(a) *Ante*, page 316.

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should not the Court declare the present petitioner to have a lien on the estate, without stopping to consider the value thereof? But if positively necessary to ascertain such value, and if, as is said, the assignees will take the account at leisure, and ascertain its value,—the value of the bankrupt's interest, why not allow the petition to stand over till that has been done?

Then it is said an order for sale would be injurious, as the bankrupt's interest would fetch nothing, owing to the right of pre-emption. The petitioner would be the greatest loser by that. But it is objected this Court has no power to deal with the rights of the co-lessees. It is admitted a court of equity has such power, for it is said the petitioner must have recourse to equity. But this is a court of equity, and with full powers. As to the right of pre-emption, why may we not order the property to be offered to them? If they purchase, we shall know what to do with the purchase money: if they decline, the difficulty is removed. The sale should not be in defiance to the right of pre-emption, but subject thereto. It has been urged, that this, being a conveyance of all a trader's property, was an act of bankruptcy, and invalid; but the fact that it was the whole of his property is a mere unsupported assumption; and if fact, yet working a coal mine is not a trading which subjects to the bankrupt laws. Suppose a deed had been executed, instead of a memorandum and a deposit, would not the deed have been valid? It is said the assignees may intend to go on with the working of the concern; they might so intend; but do they? Have they come forward and declared such intent? I therefore, on the whole, cannot perceive why the petitioner should not be declared equitable mortgagee, reserving the rights of all persons not before the Court. From what I have said, it may not, perhaps, be difficult to gather what my

opinion is ; but, in deference to my learned colleagues, I will give no judgment which may be at variance with theirs.

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Sir *George Rose* : — The jurisdiction in cases of mortgage is assumed from principles of convenience. Whether the mortgage be legal or equitable, the Court can only interfere when the case is perfectly free from doubts as to title, &c. The memorandum in question amounts to no more than an agreement to give a stranger an interest in the partnership chattels ; for a lease of land, for partnership purposes, is a partnership chattel. I do not say that a party cannot transfer such an interest as exists in the present case ; but this is not a case perfectly free from all doubt,—not one in which we ought to interfere. If this were a deposit of a lease, the party might retain it, and make the most of his possession ; but this is a deposit of an attested copy only, and the intent of the deposit to pass an interest in the partnership chattels ; and it is a principle of courts of equity not to extend the doctrine of equitable mortgages ; and no precedent can be cited for doing what the petitioner asks.

Per Curiam : — The petition must be dismissed.

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On an unsuccessful application to the commissioner to expunge a debt under section 60 of 6 G. 4. c. 16. the applicant may be ordered to pay the commissioner's and solicitor's fees, and sums paid for the use of the room, &c.

Ex parte KIRKALDY. — In the matter of HOLT.

CALVERT and *Hume* applied to the commissioners under section 60 (a) of 6 Geo. 4. c. 16. to expunge a debt proved by the assignee, and entered into an undertaking, to be filed with the proceedings, to pay whatever costs the commissioner should adjudge. The petitioner, who was the assignee, paid out of his pocket 12*l.* 17*s.* 2*d.*, the costs of the meetings, &c. for this purpose, which sum the commissioner ordered *Calvert*

(a) "That whenever it shall appear to the assignees or two or more creditors who have each proved debts to the amount of twenty pounds or upwards, that any debt proved under the commission is not justly due either in whole or in part, such assignees or creditors may make representation thereof to the commissioners; and it shall be lawful for the said commissioners to summon before them, or examine upon oath, any person who shall have so proved as aforesaid, together with any person whose evidence may appear to the petitioners to be material either in support of or in opposition to any such debt; and if the said commissioners on the evidence given on both sides, or if the person who shall have so proved as aforesaid, shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode, upon the evidence adduced by such assignees or creditors as aforesaid, shall be of opinion that such debt is not due either wholly or in part, the said commissioners shall be at liberty to expunge the same either wholly or in part from the proceedings, provided that such assignees or creditors requiring such investigation shall, before it is instituted, sign an undertaking, to be filed with the proceedings, to pay such costs as the commissioners shall adjudge to the creditor who proved such debt as aforesaid, such costs to be recovered by petition; provided also, that such assignees or creditors may apply in the first instance by petition to the Lord Chancellor, or that either party may petition against the determination of the commissioners."

and *Hume* to repay to the assignee, which they had not done.

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The following were the items of the 12*l.* 17*s.* 2*d.*

	£	s.	d.
Fees to commissioner - -	4	0	0
Ditto for journey - -	2	0	0
Solicitor under the fiat for meetings	1	0	0
To ditto for journey - -	1	0	0
Fee to commissioner - -	1	0	0
Room - - - -	0	10	6
Petitioner's solicitor - -	2	0	0
Messenger's bill - -	1	6	8
	12	17	2

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This was a petition by the assignee for an order on *Calvert* and *Hume* to pay the money.

Mr. *Purvis* for the petition.

Mr. *Swanston* for the respondents:—

1. The commissioner does not order any costs to be paid “to the creditor,” which is what the act authorizes him to do, but he orders payment of fees to the commissioners, and to the solicitor, of the sums charged for the use of the room, and of the messenger’s bill.

2. The solicitor has no right to charge 1*l.* for attendance. That creates an objection to the whole bill, *ex parte Thekwall*, 1 *Rose*, 397.

3. The fee for travelling is illegal, *ex parte Thekwall*, 1 *Rose*, 397.

Per Curiam:—The sums paid by the creditor, the petitioner, certainly come within the intent of the 60th section. As to the other objections made, if the sums were glaringly improper, the Court might refuse

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of

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to make the order ; but that is not the case. As, however, the respondent insists that some of the items are charges which cannot be allowed, the Court will make the order without prejudice to taxation, if the respondents think proper to have the costs taxed.

Ordered, with costs, without prejudice to taxation.

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Ex parte THE NATIONAL BANK OF SCOTLAND.—In the matter of MABERLY. (a)

Maberly and the Scotch Bank mutually exchanged their notes at stated times. *Maberly* became bankrupt, his agent *Blythe* having notes of the Scotch Bank in his hands. The assignees subsequently allowed *Blythe* to retain these notes in account with them, he having claims against *Maberly*. Held, the Scotch Bank could recover these notes against the assignees.

THIS was a petition that the assignees might pay to the petitioners the proceeds of certain bills.

Maberly carried on business as a banker in Scotland, and issued his own promissory notes.

The petitioners were also bankers in Scotland, issuing their own promissory notes.

Maberly appointed *Blythe* as his agent in Edinburgh.

The petition stated, that for several years past a custom had been established among the several bankers in Edinburgh, and at their several branch establishments in Scotland, of exchanging, at stated periods, the promissory notes which they respectively held of each other, and paying the difference of such exchanges by an order upon their respective correspondents in London : That the petitioners had at stated periods in every week, from February 1826, regularly exchanged with *Blythe* in Edinburgh the notes of *Maberly* taken by the petitioners for the notes of petitioners taken by

(a) It will be perceived that *parte* *Cunningham, Mont. & Bli.* the leading circumstances of this 269, and *ex parte* *Solomons,* case are similar to those of *ex* *Mont. & Bli.* 508.

Blythe as agent of *Maberly*, and gave or received cheques or orders in London for the payment of any residue.

Maberly stopped payment on the 2d of January 1832, and on that day sent notice thereof to *Blythe* and his other agents.

On the 4th of January *Blythe*, as agent of *Maberly*, had in his possession divers notes of *Maberly's*, amounting to 3,925*l.*, including notes of the petitioners for 208*l.*; and *Blythe* subsequently received from other agents of *Maberly's* 2,877*l.*, including other notes of the petitioners, amounting to 22*l.*

Blythe claimed to be a creditor of *Maberly* for 4,424*l.* in respect of advances made, which he claimed to retain out of the 3,925*l.* and 2,877*l.*

On the 6th of January, therefore, *Maberly*, through his agent *Blythe*, had bills of petitioners to the amount of 230*l.*, and petitioners had bills of *Maberly's* to the amount of 764*l.*, and on which day the petitioners desired *Blythe* to exchange their respective notes as usual, which he refused.

A fiat issued against *Maberly* on the 26th of January 1832.

Various processes were had recourse to in the Scotch Courts, as stated in the former cases before this Court (a), concluding by an order of the Court of Session, which was as follows: — “ The Lords, &c. in respect that the question raised by the various applications for interdict by the several parties mentioned in this petition is not strictly or legally a question of vindication of property, but a question of preference on funds legitimately in the possession of *Blythe*, agent and manager for the bankrupt, and which will be most

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(a) See *ex parte Cunningham*, Mont. & Bli. 274.

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properly discussed and determined under the proceedings in bankruptcy in England, decern and ordain *Blythe* to pay and deliver to the assignees of the estate and effects of *Maberly*, or their mandatories, the whole bank notes and other monies and effects in his hands, as agent for *Maberly*, after deducting 4,424*l.*, for which he claims a right of retention; and reserve to all parties their respective rights and claims of preference to be insisted upon in the form of proceeding in England," &c.

Blythe was allowed by the assignees to retain 3,925*l.* in part satisfaction of his debt of 4,424*l.*, and he paid over to the assignees 2,877*l.*

On the 25th of October 1832 the petitioners proved under the fiat against *Maberly* for 198*l.*, for money had and received, &c. by *Maberly*, and also for 562*l.* remaining due on promissory notes of *Maberly* in the hands of the petitioners, after deducting by way of set-off the 230*l.*, the amount of the notes in the hands of *Maberly*, or his agent *Blythe*, at the time of the bankruptcy.

At the same time the petitioners were allowed to enter a claim for the 230*l.*, but without prejudice to their right to recover that sum from the assignees, or of their right of set-off against the assignees. This was a petition stating the above facts, and that on the 30th of January 1834 Mr. Commissioner *Fonblanque* decided, that such right of set-off did exist; and that application had been made to the assignees for the 230*l.*, but that they had not paid the same, and praying that they might be ordered so to do, with costs.

Mr. *Swanston* and Mr. *Montagu* for the petitioners:—
This case must be governed by *ex parte Solomons*, *Mont. & Bli.* 308, as the two cases do not differ, except that there was an agreement in this case for the mutual exchange of the notes.

Mr. *J. Russell* and Mr. *Bethell* for the respondents:—

The present case not only differs from *ex parte Solomons*, *Mont. & Bli.* 308, but the principles of the decision of that case are directly against the prayer of this petition. In *ex parte Cunningham*, *Mont. & Bli.* 269, the property was sent to *Blythe* for a particular purpose. The law applicable to that state of things is thus laid down by Lord *Tenderden* in *Buchanan v. Findley*, 9 *Barn. & Cres.* 748, “ the bills were sent to the defendant for a specific purpose, and as soon as the defendant declined to perform that purpose the right to retain the bills ceased, and the party was legally bound to restore them on demand.”

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On the same subject, Sir *John Cross* says, in *ex parte Solomons*, *Mont. & Bli.* 311, “ The assignees claim the money as paid to *Blythe* by *Solomons* specifically, but *Blythe* having claimed a lien upon the money, an arrangement is made between them. Behind the back of the petitioner, it is agreed that *Blythe* shall keep the money of *Solomons*, and pay over other monies to the assignees. Then they come into this Court and say, ‘ We have not got the money, it is in the hands of *Blythe*.’ They have got the money by the effect of their arrangement with *Blythe*.”

In the former cases (*a*) the foundation of the decision was, that the property had never been out of the assignees; for if they had allowed *Blythe* to retain the money improperly, it was the same as if they had received it for the use of the petitioner.

In order to make the former cases precedents here it must be proved, that in this case the money was always

(a) *Ex parte Cunningham*, *Mont. & Bli.* 269; *ex parte Solomons*, *Mont. & Bli.* 308.

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considered as in the possession of *Maberly*, which cannot be proved. The contrary was the fact. The notes, at the time of the bankruptcy, were in the hands of *Blythe*, who had advanced sums to *Maberly*, on condition of having a lien on all the bills and proceeds which passed through his hands. When the bankruptcy took place *Blythe* availed himself of his lien, retained the notes, and refused to exchange them when called on so to do.

The custom of exchanging notes once every week can make no difference in the rights of the parties. *Blythe* held them subject to the rights of the parties entitled. It is alleged that *Blythe* was bound on a certain day, the 6th of January, to have exchanged notes. He was not bound, it being a course pursued for mutual convenience only, but not obligatory.

The assignees never received the money, and there is no constructive possession as against the estate and the general creditors.

The only rights the petitioners possess are against *Blythe*, and before they substantiate any claim against the assignees they must prove they have the proceeds of the bills, which is not the case. *Blythe* has them, and the petitioners admit the lien of *Blythe*.

In all cases where constructive possession of the assignees enables a party to recover against them, the party must have been able to have succeeded in an action of trover, or for money had and received. Here no such action could be sustained against the assignees.

The petitioners claim the whole of the 230*l.*, but they are only entitled to a proportionate part thereof, as was held in the somewhat similar case of *Huckey v. Young*, 1 *Mad.* 577.

But supposing these difficulties overcome, yet the form of the petition does not enable the Court to act as

prayed. The property is not in this country, but in Scotland: the Court here may give an opinion, but that is all. The money being in Scotland, the Court there impounded it, and declared that the question of right thereto must be decided in England. No objection exists to this Court declaring the right of the parties; but this petition asks that the assignees may be ordered to pay the money; if that order be made, they must pay out of the funds of the estates in this country, as they have not the funds in Scotland at their disposal. The Court of Scotland sent all questions of law to be decided here, but retained the money; so that if this Court decide the questions of law in favour of the petitioners, yet they must go to Scotland for the money.

It is, therefore, submitted on the whole, that there is no right of property in the petitioners, because the agreement did not apply between the petitioner and the assignees, and they have not established their right to call on the assignees.

Mr. *Swanston* in reply:—

On the 4th of January notes were in the hands of *Blythe* as agent of *Maberly*; on the same day notes of *Maberly* were in the hands of the National Bank of Scotland: this raises a case of mutual debt or set-off. In addition to this, there existed a course of dealing with these notes—more specifically set out in the Scotch proceedings (a) than in this petition—in pursuance of an agreement, whereby *Maberly* and the National Bank agreed that their notes should be exchanged on certain days. The notes, if in the hands of *Maberly*, were liable to a set-off in account with the National Bank: were

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(a) See the Appendix, *Mont. & Bli.* xvii.

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they not subject to the same right of set-off when in the hands of *Blythe*, who held the notes merely as agent of *Maberly*? for he advanced no claim on his own account till after he went before the Scotch courts, that is, till after the bankruptcy.

THE CHIEF JUDGE:—

If the facts were simply, that, at the time of the bankruptcy of *Maberly*, he was in possession of notes of the National Bank, and the National Bank held notes of *Maberly*, that would entitle the National Bank to set-off and claim an interchange of the notes. If the notes were in the hands of the assignees, there can be little doubt but the same right would exist.

But it has been argued, that peculiar circumstances in this case will lead to a different result. These circumstances are, that the notes were not in the hands of *Maberly* at the time of his bankruptcy, and that they never came into the hands of the assignees, who therefore cannot be called on to pay. It is said that *Blythe* advanced money to *Maberly*, on terms of his having a lien on the notes and proceeds passing through his hands, and that he availed himself of that lien. It is material to ascertain at what time that was done: if done before the bankruptcy, that would be an answer to the claim of the petitioners, and nothing subsequently by the assignees in this case would amount to a waiver of the defence which that would afford them. But, at the date of the commission, the notes were in the hands of *Blythe* as agent to *Maberly*, with notice of the bankruptcy, and subject to *Blythe's* right or lien, to pay himself: but as *Blythe* did not actually appropriate the notes before the bankruptcy, or before the interdict, he had no higher right to them than *Maberly* would

have had if the notes had been in his (*Maberly's*) hands. But the decision of this case will not rest on any such general grounds. There had existed, during a long period, a regular course of exchanging notes; on the 6th of January a demand to exchange was regularly made and refused by *Blythe*, not on the ground of any lien he possessed, but the refusal was general, and we are left to conjecture the grounds; one ground might be the bankruptcy of *Maberly*.

If, then, the assignees had taken no active step to transfer the property to themselves, the fact of the retention of the notes by *Blythe* would have been an answer to this petition.

But on the 22d of May 1832, the assignees presented a petition to the Court of Session in Scotland, claiming the property as *Maberly's* assignees, and expressly reserving *Blythe's* claim; and on that petition the interlocutor of the 10th of July was pronounced, transferring to England the discussing of all questions, except that the assignees had now transferred to themselves the liability to the present petitioners by claiming the property in dispute, and except that the assignees appropriated to the payment of *Blythe* the very notes now in question; by so doing they took on themselves the dominion over these notes; this is taking on themselves to deal with them as the property over which they had power as assignees of the bankrupt, and has the same consequences as if they had themselves actually paid them over to *Blythe*; it amounts to a virtual conversion, which was the ground of the decision in *ex parte Solomons, Mont. & Bl.* 269.

Then, it is urged, the assignees are only liable for a proportionate part of the sum allowed to be retained by *Blythe*, and *Huckey v. Young*, 1 *Mad.* 577, was cited in

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support of that argument. That case supports [the general proposition on which the former cases (a) went, and on which the present case is decided; viz. that the actual receipt of the notes by the assignees is not necessary: moreover, in that case, the assignees compromised; in the present case, they received the whole. They made a settlement, and disposed of the whole sum in the hands of *Blythe*. In *Huckey v. Young*, 1 *Mad.* 577, there was no prior claim of a creditor; the parties attached money in the hands of an absconding clerk, and then the assignees stepped in, and a compromise was entered into, and they received 100*l.* for which they were held liable.

In the present case the assignees have rendered themselves liable as for the whole of the property in the hands of *Blythe*; that is, they have done what is equivalent to paying the money away by permitting *Blythe* to retain it; in as much as the petitioners are thereby damnified, they are entitled to the prayer of their petition.

Sir *John Cross* :—The circumstances of the present case are distinguished from those of the former cases (a), for in those other cases the property never was the bankrupt's, while here it once belonged to the bankrupt; and the question is, what influence that difference should have on the judgment of the Court. If it had been established that *Blythe* had a lien on the precise notes before the day of exchange, I should think the petitioners not entitled to the relief they seek; but it lay with the respondents to establish that fact, which they have

(a) *Ex parte Cunningham, Mont. & Bli.* 269; and *ex parte Solomons, Mont. & Bli.* 308.

not done, and I cannot see that the bankrupt conceived *Blythe* had such a lien. The general course of dealing is not material, for *Huckey v. Young*, 1 *Mad.* 577, proves, that, independent of any usage, the petitioners had a general right to the exchange of the notes. I am, therefore, of opinion that the same judgment must be given in this case as in the last given before this Court. (a) The assignees have dealt with the property in account, and have paid off a lien which existed in some of the bills with some of their proceeds.

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Sir *George Rose* :—

Justice will be satisfied by the order to be pronounced in the present case, as it was in *ex parte Solomons* (a), the assignees being called on to return the petitioners' own property.

Huckey v. Young, 1 *Mad.* 577, does not assist the defence. If in affirmance of a contract the creditors insist on any contract as against the assignees, the latter can never be held liable beyond the amount of assets coming to their hands.

If this case were before a jury in an action of trover, it would be a simple question of yes or no.

The first question which the petition required to be solved, was, whether the 250*l.* were or were not the property of the National Bank. By force of the agreement, a right to exchange existed, which was pursued through the interdict, which decided that the assignees had no claim; but that proceeding still left open the question as to the right of the petitioners and other persons; but, till disputed, the property stood that of the National Bank: then, have the assignees converted this

(a) *Ex parte Solomons*, *Mont. & Bli.* 308.

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Ex parte
 The
 NATIONAL
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property to their own use? They say the conversion was by the bankrupt, and the claim of the petitioners against him alone: this would have been a sufficient answer if the assignees had not interfered; but they did interfere; they instituted a suit in Scotland and obtained an interdict, to which they make the National Bank and all other persons parties; the consequence of which is that the assignees have placed the property *in medio*, which amounts, for the purposes of this petition, to the same thing as if they had actually received the money; if so, the petitioners may claim through them, unless prevented by any lien of *Blythe* or *Maberly*. Is there any lien in *Blythe*? If there be, that is a good defence to the assignees; but they have not produced any evidence thereof, not even enough to entitle them to an inquiry on the subject. Then it is said, that as the assignees are only entitled to a balance from *Blythe*, that ordering them to pay the whole to the petitioners is a hardship. The case involves a competition of hardships, and the least must be chosen.

But the petitioners must allow the assignees the use of their name, in order to enable them to reclaim what they may be able from *Blythe*.

It appears to me the petitioners are fully entitled to the prayer of their petition.

Ordered as prayed. Costs of both parties out of the estate.

Ex parte SIDEBOTHAM, assignee, &c. — In the
matter of BARRINGTON.

C. of R.
July 24,
1834.

THIS was the petition of *Sidebotham*, the assignee of
Barrington.

Specific per-
formance de-
creed under the
circumstances.

On the 2d of February 1833, a fiat issued against
Barrington, and *Sidebotham* was chosen sole assignee.
Certain mortgaged premises were put up to sale under
the usual order of the commissioners. *William Bar-
rington*, a son of the bankrupt, attended the sale and
became the purchaser, and gave his promissory note for
37*l.* for the deposit, and was duly declared the purchaser
by the commissioners; the note was not paid when
due.

The petition prayed that *William Barrington* should
pay the purchase money into court.

The defence was, that the assignee could not make a
good title, the fiat being invalid. The bankrupt, in 1829,
took the benefit of the Insolvent Debtors Act, and the
debt of the petitioning creditor under the present fiat
was inserted in the schedule given in to the Insolvent
Debtors Court. All the estates of which the bankrupt
was then possessed, which included the equity of re-
demption of the premises in question, were vested in
the provisional assignee (a) of the Insolvent Debtors
Court.

The amount of the mortgage debt was inserted in the
schedule in the Insolvent Debtors Court.

After *William Barrington* had been declared the pur-
chaser, he granted a lease of the premises for fourteen
years; the lessee, *Ralph Arden*, was the son-in-law

(a) No regular assignee was ever appointed.

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of the bankrupt, and had been in possession of the land some time, having been put into possession by the bankrupt some time before the bankruptcy, but under what circumstances did not appear.

Mr. *Swanston*, Mr. *Teed*, and Mr. *J. Russell* for the petition: —

The Court has jurisdiction to enforce specific performance of a purchase made under an order of the Court. *Ex parte Gould*, 1 Gl. & J. 231.

Whatever objections may exist to a title, taking possession of the estate, with a knowledge thereof, is a waiver of such objections, *Burnell v. Brown*, 1 Jac. & Walk. 168, and other cases. (a) And, here, the granting the lease is a taking possession. There is much distinction between a purchase *in pais*, and a purchase under an order of a Court; in the latter case, any the least inconsiderable interference or step binds to an acceptance of title; even paying purchase money into court is conclusive. In this case the party is stopped by his acts from objecting to the title.

Mr. *Montagu*, Mr. *Bethell*, and Mr. *Rogers* for the respondent: —

The Court has no jurisdiction to enforce a sale made by assignees. If this were a sale by the Court, it is said that *ex parte Gould*, 1 Gl. & J. 231, would furnish a precedent; but, first, this is not a sale by the Court, but by the commissioners; and, second, *ex parte Gould* was decided *ex parte*, and the purchaser did not appear to object to the jurisdiction.

Granting, however, that the sale was made by order of the Court, such sale was, of course, made on the sup-

(a) See *Sugden, V. & P.* 215; and see 11, 118. Edit. 8th.

position that the Court could give effect to its order, that there was something to sell of which the purchaser would be put into possession; but this is not the case: the equity of redemption is vested in the assignee of the Insolvent Court, over whom this Court has no jurisdiction; as the 7 Geo. 4, c. 57, s. 13 (a), after enacting that filing a petition in the Insolvent Debtors Court shall be an act of bankruptcy, and that any commission thereon, issuing within two months, shall avoid the conveyance made to such assignee, goes on to enact, "Provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid; but that every such conveyance and assignment shall be good and valid, notwithstanding any commission of bankrupt under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of such two calendar months as aforesaid." If, then, the Court be vendor, and have put up an estate for sale which turns out to be without a title, will it enforce specific performance, and, against all equity, compel a purchaser to buy a shadow? So to do would contravene a fundamental ground of equitable interference, viz. relief against mistake and accident; it is a case of hardship, and one in which equity would not decree specific performance.

A serious objection exists to this Court endeavouring to order specific performance. Cases involving complicated points of title will arise, and this Court has not the machinery of Masters, &c., to whom references may be made on points of title: consequently the time of the

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SIDEBOTHAM
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(a) Continued by the 10 Geo. 4. and 1 W. 4. c. 58.

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Court might be occupied to an indefinite length in discussing such points.

Burnall v. Brown, 1 Jac. & Walk. 168, decided that taking possession, after delivery of the abstract, was a waiver of objections to title: here the lease was executed before the delivery of the abstract, and contains a condition that it should only be operative if a good title were made: in *Burnall v. Brown*, 1 Jac & Walk. 168, the circumstances were very strong; a considerable portion of the purchase money had been paid, and indulgence granted as to the remainder, and the conveyance was drawn, &c. Here no possession was ever taken by the purchaser: the intended lessee was not put into possession by him, but by the bankrupt long previously to the bankruptcy: the purchaser granted a lease with a condition that it should only be good, if a good title were made, which has not been done, consequently the lease is at an end; and, under all the circumstances, was a perfectly nugatory act; if the fiat be bad, the lessee will be ejected.

The respondent, knowing that the equity of redemption was vested in another, merely bought the mortgage, and he entered as mortgagee, not as purchaser.

Even if the petitioner had granted a lease, under supposition that he had a title, yet if that idea were premature, he would not be bound, *Deverell v. Bolton*, 18 Ves. 505. In *Burrowes v. Oakley*, 3 Swan. 159, it was held that a purchaser was entitled to an investigation of title, notwithstanding that he took possession, and exercised acts of ownership, and a conveyance was prepared; on that occasion all the cases were reviewed, and the Master of the Rolls says (page 168), "In proceeding to consider the effect of the evidence a court of equity called on to enforce specific performance of an agree-

ment for the conveyance of an estate to one party, and payment of the purchase money to the other, must feel anxiety to protect the purchaser and give to him reasonable security for his title, not compelling him to take a title without knowing whether it is good or bad. The vendor, if his title is good, suffers only the inconvenience of delay, but the vendee, if it is bad, may sustain a severe loss. The inclination of the Court therefore is in favour of the vendee, and a vendor claiming to be excepted from the general rule is required clearly to establish a case of exception. What circumstance has this plaintiff proved to warrant the Court in considering the present an excepted case. The decisions in *Fleetwood v. Green* (a) and the other cases cited are founded not so much in a rule of equity limiting a time within which objections must be taken, and visiting delay with punishments, as on a conclusion of fact, the Court being satisfied that the purchaser intended to waive, and has actually waived his right of examining the title. When the Court is convinced that that is the just conclusion from the facts of the case, then and then only is it authorized in denying to the purchaser his ordinary equitable right. The question therefore is one of fact, what is sufficient to authorize that denial. Possession taken by the defendant has been properly insisted on as a very important fact, and undoubtedly it becomes a purchaser to be careful in what circumstances he takes possession; but, whatever weight may belong to that fact in ordinary cases of evidence of waiver of title, in this case certainly no such inference can be deduced."

Another objection exists, which is, that, if specific performance be decreed, the Court must order all neces-

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(a) 15 Ves. 594.

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sary parties to join in the conveyance ; the provisional assignee is an indispensable party, and what jurisdiction have the Court to enforce such an order against him ?

The petition prays that the purchase money may be paid into Court, but in such cases as the present, an option of delivery up of possession of the estate is allowed (a) and is now offered.

Mr. Swanston in reply was stopped by the Court.

The CHIEF JUDGE:—

Many objections have been made to this Court exercising jurisdiction in this case, and many difficulties suggested as obstructing the carrying its judgment into effect ; amongst others, the time which would be consumed in discussing questions of title ; when any case involving that difficulty arises, it will be time enough to consider what course to pursue, and whether such cases should be sent to a court whose machinery more easily enables such difficulties to be overcome.

The question in this case, is not whether there exist any objections to the title, but whether, even if there be, they have not been waived ? This being a sale under an order of Court, gives us jurisdiction to enforce specific performance ; it would be otherwise if it were a sale merely by the assignees. The question then is, has the party waived the objections ? If not, that they are valid, is clear : for though it might be difficult to prove that the title was elsewhere than in the assignees under the bankruptcy, yet it is doubtful whether the fiat be valid, and also whether the equity of redemption may not be vested in the assignee under the insolvency.

(a) *Clarke v. Wilson*, 15 Ves. 317 ; *Smith v. Lloyd*, 1 Mad. 85 ; *Morgan v. Shaw*, 2 Merr. 138 ; *Wickham v. Everest*, 4 Mad. 55.

If, as has been urged, the respondent had, under an order of this Court, bought a mere shadow, it would become a very serious question whether it would interfere to compel him to pay for what was valueless: but this is a sale by assignees, with the concurrence of the mortgagee; it is clear therefore that some estate is sold; the only question is how much? whether there remain the equity of redemption in the assignee under the insolvency?

Mere taking possession is not a waiver of objections to title; but in this case, it is impossible to doubt that the purchaser intended to give the lessee possession under his title as purchaser, and intended to waive all objections to title, for there were no objections of which he had not, from the very first, been fully aware.

It is said the respondent never took possession. What possession can be taken by one who grants a lease, which has not been taken here? The possession of the tenant is the possession of the landlord.

The real cause of the reluctance to complete the purchase, does not arise from any objection to title, but from some other circumstances kept in the back ground.

I am therefore of opinion that the objections to the title have been waived; that specific performance must be decreed, and that the purchase money must be paid into court.

Sir John Cross:—

The question of jurisdiction is without difficulty, this being a court of law and equity, having jurisdiction in all matter of bankruptcy. Lord *Eldon* says (a) “I am convinced that it was the intention of the legislature in giving jurisdiction to the Chancellor in bankruptcy, to

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(a) In *ex parte Bradley*, 1 *Rose*, 203.

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give him power to use in bankruptcy the authority used in cases in chancery, where no specific authority is given by the statutes. In this Lord *Hardwicke* supports me." But if any doubt existed, would it not have been waived by arguing, as has been done, on the merits, and taking the chance of a favorable decision thereon? It may be imagined indeed, that if there be no jurisdiction, the whole would be *coram non judice*. (a) Such is not the case. Lord *Eldon* said in *ex parte Rose*, 1 *Rose*, 18, "I am well aware how careful I ought to be of extending a jurisdiction not admitting of appeal. I may, however, interfere by consent, and if the parties should afterwards refuse to obey my order, I would commit them." I am of opinion that when a party argues on the merits, he submits to the jurisdiction.

As to the merits, I concur with his Honor the Chief Judge, that the objections have been waived. The purchase was made on the 5th of June 1833: made under the advice of a solicitor knowing of the insolvency; made by a son of the bankrupt, and made by a brother-in-law of the person in possession. If the objection were serious, yet he knew of it before he became a purchaser, and he knew that no one had—and no one since has—claimed any outstanding title. Why does he now set up the objection? Merely to slander the title he has purchased: and under what circumstances did he purchase? Why under some understanding with the bankrupt: he did not purchase because he wanted the estate himself, but in order to keep it in the family, to keep possession while he could, and then shuffle with objections to title. Several months after the purchase, and after he had pondered on the

(a) *Attorney General v. Holtham*, 3 *Russ.* 415; *Mitf. Plea.* 153, edit. of 1827.

objections, he granted a lease for fourteen years, this was intended as a waiver of the objections. It is alleged there is some clause in the lease, that it should only be good if the title were perfected; the lease has not been produced, and may not contain any such clause, but if it do, is it not of course that he could grant no lease, unless he had a title? But he assumed a right to lease, he assumed he had a title. The objection is an after thought to enable him to keep possession without paying for his purchase.

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Sir George Rose: —

This is the first case in which this Court has been called on to decree specific performance of an agreement for purchase of an estate. Under the circumstances of this case the Court has jurisdiction. But the facts that the parties are assignees, that the property is the bankrupt's, that the parties have filed affidavits, or that they have argued the question, do not of themselves confer jurisdiction, if none exist without them: the question always is, Can the Court enforce its order by attachment? In this case it can; the purchase being made under an order of court gives jurisdiction.

This jurisdiction should be exercised by analogy to that of equity. No question arises as to the contract or agreement for purchase: consequently, if the objections to title had not been waived, the first step would have been a reference to an officer of the Court or one of the judges, to inquire whether or not there were a good title. There is no difficulty on account of the absence of proper machinery in this Court, as has been suggested, the registrars and deputy registrars of this court being barristers, and equal to such tasks. Following the analogy to equity, we find the making the lease was a taking possession, which is a waiver of objections to title: such

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is the general rule: exceptions exist, but this case is not within any of them. How was the possession intended to be taken? The inference from the lease is conclusive that he intended to waive all objections.

As to the assignee under the insolvency being a necessary party to the conveyance, I think the order of this Court will go a great way towards obviating that. (a)

The order made was, Declare the objections waived, the title accepted, and the contract to be enforced. Purchase money to be paid into Court. Reference to Mr. *Gregg* to settle the conveyance, if the parties differ, and to settle who are proper parties. The costs to be paid by the respondent.

Ex parte **ELLIOTT.**—In the matter of
W. HUMPHREY.

C. of R.
 July 25,
 1834.

Unopened fiat
 amended by
 inserting the
 proper parish.

MR. BURTON moved that a country fiat, which had not been opened, might be amended by altering the parish. The bankrupt was described of a wrong parish; he resided a few yards out of the parish in which he was described as residing, but was usually known as of, and his letters addressed to the wrong parish.

Ordered.

(a) The 11 Geo. 4. & 1 Wm. 4. the provisional assignee should c. 38. s. 5. enacts that if any interest be vested in the provisional assignee, which appears of no value to the creditors, but nevertheless it may be expedient that join in some conveyance thereof, that the commissioners of the Insolvent Court may order him to join in any conveyance thereof, &c.

Ex parte CASTLE.—In the matter of PAYNE.

C. of R.
July 25,
1834.

THIS was a petition of creditors to tax the solicitor's bills, which had been paid to the amount of 11,000*l*.

Mr. *Wright* for the petition.

Mr. *Twiss* for the solicitor : — The petitioners should first have applied to the commissioners under section 114 of 6 Geo. 4. c. 16. and have had the accounts of the assignees audited. But this is a petition of creditors to tax the solicitor's bill. *Ex parte Walker*, 1 Gl. & J. 95, decided that the assignees, and not the creditors, were to petition.

Creditors may petition to tax the solicitor's bill, though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings.

Mr. *Swanston* appeared for the commissioners.

Per Curiam : — The decision in *ex parte Walker*, 1 Gl. & J. 95, was, that a creditor had no right to petition, unless the assignees had been guilty of a dereliction of duty. This case comes within that rule. The assignees are served with this petition, which states, that they paid bills amounting to 11,000*l*., which bills are not on the proceedings. It amounts to misconduct to go before the commissioners and procure bills to this amount to be paid without preserving a record of the items.

Taxation ordered.

C. of R.
July 28,
1834.

Ex parte DOBSON.—In the matter of
THOMPSON.

A claim or proof cannot be resisted because the creditor has property belonging to the estate in his possession;—that is only a ground to restrain payment of the dividends.

The Court has not jurisdiction to order property alleged to have been given as a fraudulent preference to be delivered up, because the party has claimed.

IN July 1828 a commission issued against *Thompson*, under which the petitioner was elected sole assignee.

For several years previous to the commission, the bankrupt had resided and carried on business at New York in America, as shipowner and purchaser and shipper of cotton. He was at the same time engaged with his brother as a manufacturer of woollen cloth in England.

For several years prior to his bankruptcy he had been in the habit of shipping cotton from America, consigned by him ostensibly on his own account and risk, but secretly in partnership with his brother in England. They were consigned to *Rathbone and Co.*, Liverpool, for sale by them, and they were to apply the proceeds in payment of bills of exchange drawn by the bankrupt in New York on *Rathbone and Co.*, and, after paying such bills, to pay the surplus to his brother in England.

The bankrupt in these transactions sustained heavy losses, and previously to his stopping payment was indebted to various persons, and among them to *Hicks and Co.*, and was insolvent.

Before the bankrupt stopped payment, *Rathbone and Co.* had refused to accept any more bills for the bankrupt, and *Hicks and Co.* had notice of this, and had notice that he was insolvent.

Various meetings, of some but not all, of the bankrupt's creditors were held, at which a full statement of his affairs was made.

On the 30th of October 1827, in pursuance of an understanding with *Hicks* and Co., and some of his other creditors, the bankrupt stopped payment.

In order to protect some of his creditors from loss, it was agreed that the bankrupt should assign all his ships, and shares of ships, monies, and other property and effects in America, in different shares, for the benefit of certain of his creditors, to the prejudice of several other creditors.

The petition here set out certain bills of sale to some of such creditors, and stated, that by a certain other bill of sale, executed by the bankrupt at or about the period and under the circumstances aforesaid, and in pursuance of the before-mentioned arrangement, the bankrupt transferred a ship, called *The Great Britain*, valued at 37,000*l.*, of which he was sole owner, to *Hicks* and Co., at the nominal price of 55,000*l.*, in part payment of so much of a confidential debt in respect of advances made to him, and of promissory notes given to them in exchange for others which they would be obliged to take up; but that no money or other consideration passed between the parties upon the execution of the bill of sale.

The petition then set out various other transactions of the same nature, and proceeded, that at the times when such assignments, &c. were made, it was well known to the creditors, or they had good reason to believe or suspect he was in very embarrassed circumstances, insolvent, and unable to meet their demands; and such assignments, &c. were made with a view to give them a fraudulent preference, and therefore void, and constituting several acts of bankruptcy.

Hicks and Co. applied to prove, which, under the circumstances, the commissioner refused, but allowed a claim to be entered for 24,000*l.*

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The petition prayed that The Great Britain might be declared to constitute part of the bankrupt's estate, and that *Hicks* and Co. should deliver it up, or account for its value, or that their claim should be disallowed.

Mr. *Richards* and Mr. *Sharpe* for the petitioner : —

The claim, while on the proceedings, prevents the distribution of the assets. The transaction was clearly an act of bankruptcy. But the petitioner comes here to claim, and ultimately to receive dividends under the English commission ; but having property abroad in their hands, as security for their debt, they cannot prove here without giving up the foreign security. *Ex parte Chevalier*, ante, page 345.

[Sir *George Rose* : — The petitioner has not proved, only *claimed*. He has a right to prove ; but if he have security abroad, the dividend would be reserved till he gave that up. If he have the property and prove, that gives the assignees a right of action against him for that property, but this Court cannot interfere to order the property to be delivered up.]

Hicks and Co. reside at New York, so that the assignees are unable to bring any action to recover the property ; is then the claim to stand on the proceedings for an indefinite period ? [Sir *George Rose* : — No ; this Court might order the dividends to be paid into Court and invested, and to remain till *Hicks* and Co. gave up the property or took some step, for they may, after all, have a right to the property.] The Court have no jurisdiction to make the order prayed ; and if it had, the petition is irregular and premature, and must therefore be dismissed with costs. The assignees cannot petition to expunge a mere claim, or, if they could, still a previous application to the commissioner would have been necessary ; moreover they allowed the claim to be

made without opposition, consequently they cannot now petition to expunge it.

This petition prays to suspend payment of the dividends: none are payable on a claim.

But even if the petition were regular, the petitioners have made out no case; they have not proved that the commission is valid, nor that the transaction in question was subsequent to an act of bankruptcy. In fact, if the merits were gone into, it could easily be shewn that the transaction was perfectly valid both by our laws and those of America. Moreover, the petition is irregular in setting out the other transactions, which have no reference to that in question.

Per Curiam: — Will the respondent submit to the jurisdiction, and place the property *in medio*? Then the whole merits can be decided.

Mr. Swanston and Mr. Booth: —

That the respondent cannot be advised to do. The property in question is worth 37,000*l.*; the sum for which a claim is entered is 24,000*l.* Why, on this comparatively small amount of proof, are the respondents to place *in medio* — that is in peril — property worth 37,000*l.*?

All the Court can do is to declare that the respondents shall receive no dividends unless they give up the property. The Court cannot call on the respondents to bring this large sum into Court in the first instance.

Mr. Richards in reply was stopped by the Court.

THE CHIEF JUDGE: —

There is no valid reason why the respondents should

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not have placed the property *in medio*. If they had, the Court would have either decided in whom the right of property lay, or have put the case in a proper course of inquiry. But this the respondents declined to do, and asked that the petition should be dismissed with costs; and if the respondents had clearly made out their right to the property, I should not have hesitated so to do.

A party coming
 in to claim or
 prove only gives
 the Court juris-
 diction as to the
 subject matter
 of the claim of
 proof.

A mere claim
 cannot be ex-
 punged.

That the petitioners cannot have the order specifically prayed for — that is, the delivery up of the property — is clear; for a party coming in to prove or claim only gives the Court jurisdiction over him as to the subject matter concerning which he comes in, viz. the claim or the proof. Nor can the other part of the prayer as to expunging the claim be granted, even if the assignees had proved the case on their side, that the right to the property was in them. Yet all this Court would do would be to restrain the respondents from receiving dividends till they gave up that property. The Court could not directly order the property to be delivered up. Then the assignees contend that the respondent should be restrained from receiving dividends, to which it is said the application is premature, as there is only a claim on which no dividends are payable. Perhaps in strictness the application is premature; but the respondents must do some act to enable the assignees to divide the assets.

I am of opinion, that, from what I have heard of the merits, the respondents have shewn the transfer of the ship was not an act of bankruptcy, it being in pursuance of a prior valid agreement, which excludes the idea of fraud or undue preference. Nevertheless, circumstances appear which render it doubtful whether by the retroactive operation of the commission the legal

property in the ship were not vested in the assignees on the 30th of October. If so, there would only be an equitable claim in the respondents, which would not be available till they had applied in the usual way for a sale, and leave to prove for the difference. It is by no means perfectly clear that the assignees may not have a right to recover the legal possession of this property ; consequently the Court should give them an opportunity of so doing.

On the whole, however, the present inclination of my mind is, that the transaction in question was a fair one, and that the respondent will finally become entitled to the costs of this petition. But the assignees must have an opportunity of trying the question if they should be advised so to do.

Sir John Cross : —

The respondents have claimed for 24,000*l.*, and, but for the proceeds of the ship, their claim would have been to a much greater amount. The assignees call on the Court to declare the transfer of the ship fraudulent and void, and to order it to be delivered up to them ; that they abandon, the Court having no jurisdiction so to do. Then they ask that the claim may be expunged, to which the respondents object that the Court have no jurisdiction to expunge a claim. I am not prepared to go that length ; but it is not necessary here to decide that point.

The petitioners then ask that they may be declared to have a lien on the dividend in respect of their right in the ship. This question of right to the ship was *sub judice* before the commissioners, it being clear that but for that they would have allowed a proof instead of a claim. But the petition calls on us to intercept the

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respondents in their way to proof, and declare that the commissioners shall never allow the claim to be matured into proof. It appears to me it would be unreasonable to make any order having that effect. The parties should go before the commissioners to prove; then all the questions discussed this day may be argued before them, and they will then admit or reject the proof, and either party dissatisfied with their decision may then appeal to this Court.

Two years, however, have elapsed since the claim was made, which may have given the respondent sufficient time to have matured the claim into proof. The objections stated by the assignee furnish *probabilis causa litigationis*. But as the respondents have not yet applied to prove, this Court will properly call on them to apply to the commissioners for that purpose within a reasonable period.

Sir George Rose : —

Where a creditor applying to prove claims a right to property on which the commissioners are of opinion he has no lien, and that the assignees have a good ground of action, the proper course of practice appears to be to admit the proof, and leave the question as one to be controlled as to dividend only. In *ex parte Ackroyd*, 1 Gl. & J. 391, the commissioners rejected the proof because there was a question as to property between the estate and the creditor; but on appeal it was held, that the proof ought to be allowed, but no dividend paid till the question had been determined. The jurisdiction of this Court on these questions is only on the footing of proof. If here the assignees had clearly no *locus standi* to have opposed proof, their petition must have been dismissed at once; but that is not so perfectly clear.

The petitioning creditor's debt is far enough back to enable the assignees to come here for protection.

It might have been convenient if the respondents would have submitted the question of right of property to the decision of this Court: without such submission we have no jurisdiction.

If the party were domiciled here, and there were an act of bankruptcy prior to the assignment, the first consideration would be, whether the property in question were chattel or not? But his being domiciled in America alters the case; the transaction must be regulated by American law, and the question could only be agitated before the proper tribunal in America, before which the party must prove that, according to the American law, their title was good. That mode they may now pursue. In the meantime the dividend must be protected; and when the right of property has been decided, that will determine the right to costs on this petition.

It has been urged in argument, that the many similar transactions in which the bankrupt engaged with other persons were improperly introduced into this petition, which relates to a single assignment of a particular ship; but if numerous transfers be made by a trader abroad, so as to amount in effect to a *cessio bonorum*, then, on general principles, a party taking advantage of a *cessio bonorum* abroad is not to be allowed to come under a commission in this country to receive dividends.

The following order was made: "Pay the present and future dividends on the claim into Court, and when paid in let the same from time to time be laid out, with liberty for the respondents to go in under the commission and make such proof as they can; but such proof is not to be resisted on the ground that the respondents have pos-

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session of the ship in question. The assignees to be at liberty to take such steps, as they shall be advised, to recover the property. Reserve further directions, and costs; and liberty to all parties to apply."

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Section 132 of
6 Geo. 4. c. 16.
as to interest is
not retrospective.
(a)

THIS was a petition by the heir-at-law of the bankrupt and others, praying that the assignees might convey to the petitioner the residue of the bankrupt's estate, without payment of interest to creditors whose debts did not bear interest.

(a) As questions on the retrospective operation of the 6 Geo. 4. c. 16. frequently occur, it may be of service to subjoin the decisions on the subject, dividing them into three classes, 1st, where the act is not retrospective, 2d, where it is; 3d, where doubtful.

But, before either of these is separately considered, it may be noted, 1st, that in *Moser v. Newman*, 6 Bing. 561, *Bosanquet, J.* says, "The Courts are cautious in giving to any act a retrospective effect by relation."

2d, Because the legislature has, in certain cases, declared that the act shall be prospective only, it has occasionally been said, that in cases where the legislature has not so expressed itself it ought

to be inferred that the act should be retrospective: in *ex parte Grundy, Mont. & Mac.* 312, Lord *Lyndhurst* says, "It is an argument fairly deducible from this section, that where the legislature intended to confine the act to future commissions the intention is expressed in direct terms; the same observation is applicable to the 96th and 98th clauses." In *Bell v. Bilton*, 4 Bing. 618, *Best, C. J.*, in considering whether section 55, which relates to annuities, is retrospective, says, "Where the legislature intended that the statute should not affect commissions previously issued, the intention is declared in express terms: such terms will be found in the 57th, 96th, and 98th sections."

The petition stated, that the commission issued in May 1794; that all the debts proved, which were very

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In *Churchill v. Crease*, 5 Bing. 177, Serjeant Taddy, in argument, says, "The enumeration of the clauses in which the act was to have a retrospective operation excludes such operation in any other than the cases enumerated." *Mags v. Hunt*, 4 Bing. 218.

But this inference seems not in general to be well founded, for the clauses may be considered as of three classes; 1st, where clearly marked by the legislature as being prospective only; 2d, where retrospective; and 3d, where doubtful: in the latter, i.e. the doubtful class, the reasoning may apply.

1st, *Where not retrospective.*

It is not where the legislature uses only prospective words, as in section 58 relating to interest on promissory notes, &c., which begins, "And be it enacted, that in all future commissions;" and in section 96 relating to the inrolment of commissions, &c., which enacts, "that in all commissions issued after this act shall have taken effect," &c.

The 73d section enacts, "That if any bankrupt, being at the time insolvent, shall (except, &c.) have conveyed, &c. to any of his children, &c. any hereditaments, &c., or have delivered and made over to any such person any bills, &c., or have trans-

ferred his debts, &c., the commissioners shall have power to sell and dispose of the same," &c. This clause is not retrospective, *Wombwell v. Laver*, 2 Sim. 360.

The 92d section enacts, "that if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of or previous to the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained in all actions at law, or suits in equity, brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit." This clause has been held to be prospective only, in *Key v. Cooke*, 2 Moore & P. 720, and *Key v. Goodwin*, 6 Bing. 576. The reason of the decision is, that otherwise the interests of those parties would be affected,

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few and inconsiderable in amount, had long since been paid in full; that among them were several debts on bills

which the 135th section enacts are to be preserved.

2d, Clauses which are retrospective.

When a clause re-enacts old law it is of course retrospective, as was said *arguendo* in *ex parte Grundy*, *Mont. & Mac.* 295, otherwise all the re-enactments in 6 Geo. 4. c. 16. would be comparatively useless.

When a clause enacts new law, whether it be retrospective does not always depend on the wording alone; other circumstances must sometimes be considered. In *Key v. Goodwin*, 6 *Bing.* 585, Lord Chief Justice Tindal says, "When new provisions are introduced which apply to particular cases, and give entirely new remedies, we must look to the very words of the sections, in order to see whether they apply or not to by-gone and then existing commissions."

Retrospective words, however, generally make the clause retrospective. By the 82d section it is enacted, "that all payments really and *bond fide* made, or which shall hereafter be made, by any bankrupt, &c. shall be deemed valid, notwithstanding, &c., and all payments really and *bond fide* made, or which shall hereafter be made, to any bankrupt, &c. shall be deemed valid,

notwithstanding, &c." This clause is retrospective, *Churchill v. Crease*, 5 *Bing.* 177; *Terrington v. Hargreaves*, 5 *Bing.* 489; the reason being the use of the words "*made or hereafter to be made.*"

But though the use of words of retrospection generally makes the section retrospective, yet that consequence does not follow, if, taking the whole into consideration, that does not appear the sound construction; thus, in *Key v. Cooke*, 2 *Moore & P.* 720, *Best*, C. J., speaking of the 92d section, says, (p. 729) "Although the words 'if the bankrupt *shall not have* given notice of his intention to dispute the commission, and ~~have~~ *proceeded* therein with due diligence,' seem to have a retrospective view, yet we must not scan them with grammatical accuracy, but look at the intention of the legislature at the time the statute was passed."

Even the use of the words "shall have," or "have obtained or shall hereafter obtain," do not make the clause retrospective if on the whole it appear not to be intended to be retrospective. Thus the 127th section enacts, "that if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been

of exchange and promissory notes, not bearing interest; and that there was a surplus to which the bankrupt was

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discharged by any insolvent act, shall be or become bankrupt, and *have obtained or shall hereafter obtain* such certificate," &c. This has been held not retrospective in *Carew v. Edwards*, 4 Barn. & Adol. 351; and see *Churchill v. Crease*, 5 Bing. 178, and *Terrington v. Hargreaves*, 5 Bing. 489. But *quære*, see *post*, in this note.

The 54th section enacts, "that any annuity creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity," &c.; and the 55th section enacts, "that it shall not be lawful for any person, entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety, for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity," &c. These clauses have been held retrospective in *Bell v. Bilton*, 4 Bing. 648, because the object of the legislature was to exonerate the bankrupt, and it had not declared the clause not retroactive. In the same way section 56 is retrospective, *ex parte Grundy*, Mont. & Mac. 511; it enacts, "that if any bankrupt

shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon," &c. The reasons for the decision were, there are no expressions confining the operation of the clause to the future, and that in clauses intended to be prospective only, that intent is expressed.

Section 128 enacts, "that every bankrupt who shall have obtained his certificate, if, &c. shall be allowed five per cent." This is retrospective, owing to the words "shall have," *ex parte Minchin*, Mont. & Mac. 136. Section 79 enacts, "that if any bankrupt shall, as trustee, be seised, &c. any real or personal estate, &c. it shall be lawful for the Lord Chancellor, on the petition of, &c. to order the assignees, &c. to convey, &c." This is retrospective, *ex parte Saunders*, 2 Gl. & J. 132. Sec-

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entitled; and that a question had been raised, whether these creditors were entitled to interest.

tion 18 enacts, "that if after adjudication the debt of the petitioning creditor be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, &c. to order the said commission to be proceeded in," &c. This was assumed to be retrospective in *ex parte Robins, Mont. & Mac.* 44, the point not having been argued.

3d, Where it is doubtful.

Section 98 enacts, that "after this act shall have come into effect," &c. There exist the dicta of two eminent judges that this clause is not retrospective; of Lord Lyndhurst in *ex parte Grundy, Mont. & Mac.* 312, and of Chief Justice Best in *Bell v. Bilton*, 4 Bing. 618. But it is to be observed, that the words are not, as in section 96, "that in all commissions issued after this act shall have taken effect," which is not retrospective; and it is conceived it may safely be asserted, that the clause in practice has always been treated as retrospective.

Whether section 127 be retrospective?

The clause enacts, "that if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors,

or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission." In *Till v. Wilson*, 7 Barn. & Cres. 684, it was assumed, but not argued, that the clause was retrospective. In *Elston v. Braddick*, 4 Tyrw. 122, it was decided that the section was retrospective.

As to clause 135.

This clause, intended as a guide to the due interpretation of the whole statute, enacts, "that this act shall be construed beneficially for creditors, and that nothing herein contained shall alter the

The petition prayed, that the Court would declare that such creditors were not entitled to interest, and

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present practice in bankruptcy, except where any such alteration is expressly declared; and that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, or demand or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted."

In *ex parte Grundy, Mont. & Mac.* 293, it was argued, that as this clause was not to "alter the present practice in bankruptcy, except," &c., and was not to "affect or lessen any right," &c., that therefore the 56th section was not retrospective; but Lord *Lyndhurst* said (page 313), "But this argument is inconsistent with the mode adopted to confine the operation of the statute in the 57th, 96th, and 98th sections, and would, in my opinion, extend the effect of the clause beyond the natural and obvious import of the words used."

But in *Carew v. Edwards*, 1832, 4 *Barn. & Adol.* 353, it was

decided that the clause was not retrospective. *Denman*, C. J., in delivering the judgment of the Court, says, "The language of the 127th section of the 6th Geo. 4. c. 16. which appears to have been taken, with some omissions, from the 9th section of the 5th Geo. 2. c. 30,* is by no means clear; and it is extremely difficult to collect from it whether the legislature intended to alter the effect of a certificate obtained prior to that act or not. If it did, the rights of creditors, and of the bankrupt himself, would be much affected; and by the 135th section of the act we find it enacted, "that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right, claim, demand, or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted." Now we cannot find any words in the 127th section by which

* Which clause is in express terms made prospective only.

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that the assignees might pay the surplus to the representatives of the bankrupt, without any deduction for interest,

Mr. *Montagu* and Mr. *O. Anderdon* for the petition:—

The commission issued in 1794. All the debts have been long since paid. The bankrupt died in 1818, and this is an application by his representatives that the assignees may pay over the surplus to them.

The question is, Whether section 132 (a) be retrospective?

There are two modes of considering this: 1st, By authority; 2d, Upon principle.

the right of a creditor, situated as the plaintiff was, to sue the bankrupt, and recover a judgment, and have execution against his effects, is *specifically* and *expressly* taken away, or the effects of a bankrupt, situated as this defendant was, are specifically and expressly vested in his assignees.

(a) That the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors who have proved under the commission shall have been paid, shall be entitled to recover the remainder of the debts due to him;

but the assignees shall not pay such surplus until all creditors who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; that is to say, all creditors whose debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon to be calculated from the date of the commission; and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the date of the commission, at the rate of four pounds *per centum*.—6 G. 4. c. 16. s. 132.

1st, Authority.

It has been decided that the clause is not retrospective, *ex parte Shepard*, August 1828, *Mont. & Mac.* 67; *Upton v. Bridges*, 18th February 1831, in which case the question was fully discussed before the Lord Chancellor in a cause, and the decision of *ex parte Shepard* was confirmed; and in *ex parte Sammon*, June 1831, *Mont.* 255, in which the Vice-Chancellor said he considered the question to be settled.

2d, As to principle.

By section 135 it is enacted, "that nothing therein contained shall affect or lessen any right, claim, demand, or remedy which any person then had under an existing commission, or upon or against any bankrupt against whom any commission had or should have issued, except as is therein specifically enacted." But as there is not any specific enactment, except by words which may be either prospective or retrospective, and as the bankrupt's right would be most materially affected or lessened if the section were held to be retrospective, it ought not to be construed to operate retrospectively. This principle of construction is recognized in *Carew v. Edwards*, 4 *Barn. & Adol.* 354, upon a question, whether the 127th section were retrospective.

Such are the decisions, and it is most fortunate that the question has been so decided, for great doubt may be entertained whether the law be not founded upon an erroneous principle, and an erroneous analogy to damages given at law upon bills of exchange, and whether it is not oppressive in its operation and injurious in practice. (a)

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(a) Q. *Is not the reasoning by maison d'un homme, disent les analogy a dangerous mode of Anglais, est son château. Une reasoning in legislation?* "La expression poétique n'est pas une

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Mr. James Russell for the representative of a simple contract creditor who had not contracted for interest :—

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raison ; car si la maison d'un homme est son château de nuit, pourquoi ne le seroit-il pas de jour ? Si c'est un asile inviolable pour le propriétaire, pourquoi ne le seroit-il pas pour toute autre personne qu'il jugeroit à propos d'y recevoir ? — Le cours la justice est quelquefois entravé en Angleterre par cette puérile notion de liberté. Il semble que les criminels doivent avoir leurs terriers comme les renards pour le plaisir des chasseurs. Un temple dans les pays Catholiques est la maison de Dieu. Cette métaphore a servi à établir les asiles pour les criminels. C'étoit manquer de respect à Dieu que d'arracher de force ceux qui venoient se réfugier dans sa maison. La balance du commerce a produit une multitude de raisonnemens fondés sur la métaphore. On a cru voir les nations s'élever et s'abaisser dans leur commerce réciproque, comme les bassins d'une balance chargés de poids inégaux. On s'est inquiété de tout ce qu'on regardoit comme un défaut d'équilibre. On imaginait que l'une devoit perdre et l'autre gagner, comme si on avoit ôté d'un bassin pour ajouter à l'autre. Le mot de *mère-patrie* a fait naître un grand nombre de préjugés et de faux raisonnemens

dans toutes les questions concernant les colonies et les métropoles. On supposoit aux colonies des devoirs ; on leur imposoit des crimes tous également fondés sur la métaphore de leur dépendance filiale."

Q. 2. Is not this law founded upon the supposed analogy to damages given at law upon bills of exchange ?

Q. 3. Are not damages given at law upon bills of exchange, upon the ground that a man, possessing property, has withheld it from his creditors, and made interest or profit of it, which he ought not to retain ?

Q. 4. What analogy is there between the case of a solvent man withholding property from his creditors, and the case of a solvent man against whom, in a time of commercial tempest, a commission has issued, which, in nine cases out of ten, ought not to have issued, and his property is taken from him, so that he cannot fulfil his contracts ?

Q. 5. Why in such case is a man to be compelled to do an act which he never contracted to do ?

Q. 6. Even if the claim is founded, what are the relative advantages and evils with which it is attended ?

The advantage is, that a cre-

Although *ex parte Shepard, Mont. & Mac.* 67, decided that section 132 was not retrospective, that was because the right to interest, whatever it was before the 6 Geo. 4. c. 16. came into operation, had become vested in the creditors by the acts of the commissioners before that act came into operation; and *ex parte Buck, Mont. & Mac.* 297, proceeded on the same ground, deciding that, not the date of the commission, but of the dividend, when the right to allowance vested, was to be considered, and that when such right vested before the present act came into operation, the clause was not retrospective. It was therefore to be inferred, that where

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ditor upon a debt, when he did not contract for interest, shall receive a few shillings, perhaps, for interest. The evil is, that the solvent bankrupt, against whom, in all probability, a commission ought not to have issued, and who, by exertion, has paid 20s. in the pound, is left destitute; his residue is spread over such a surface as to be of little use; and the plank upon which he clung for safety is taken from him.

Q. 7. Has not this clause been injurious in practice. In a commission against a country banker it was clear that, by nursing the estate, and by the diligence of the debtor, the creditors would receive twenty shillings in the pound, with about 4,000*l.* for the bankrupt; but he said "If I work for years, my surplus will be absorbed." The creditors now will

not get twelve shillings in the pound.

A commission some years ago issued, during the storm occasioned by the war with France, against one of the most respectable merchants in England. After the lapse of twenty years, and after the proceedings were lost, and the debts forgotten, the merchant returned to England, with a surplus which he had saved. He paid to my knowledge, 700,000*l.* Upon his offering to pay interest to Messrs. Barings upon a bond of 20,000*l.* Messrs. Barings declined, it and put the bond into the fire.*

* This clause was, I understand, inserted upon the suggestion of Mr. Bight. The reasons in favour of it are contained in his valuable note to *Rowe and Young*, vol. ii. p. 416, of *Bight's Reports of Cases in the House of Lords*.

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the bankrupt's right to an allowance vested after the act came into operation, although under an old commission, the amount of the allowance would be regulated by the new law. In the present case the right to interest is to be regulated by the new act; and such simple contract creditors are therefore entitled to interest, before the surplus is carried over.

Per Curiam. — The fact fails in this case, for the right to the surplus vested many years ago, when all the creditors were paid; but even if all the creditors had not been paid till the present act came into operation, which was the case in *Upton v. Bridges* (a), there is no foundation for such distinction. The question is not open; it is concluded by the former decisions.

The order made was, "Declare the representatives of the bankrupt entitled to surplus, without any deduction of interest to creditors whose debts did not carry interest."

(a) Mr. *Swanston* said, that in *Upton v. Bridges* it did not appear whether the dividend were declared *after* the act came into operation, but was mentioned in the affidavit, and *qu.* whether brought to the notice of the Court?

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THIS was a petition under circumstances similar to those in *ex parte* Solomons, *Mont. & Bli.* 308, with this exception, that the petitioner's notes were sent by the agent at Montrose in a parcel to *Blythe*, which parcel was stolen by a clerk of *Blythe's*, and the notes never formed any item in the accounts between the assignees and *Blythe*.

A custom of exchanging acceptances existed between the bankrupt and other houses, through the agency of *Blythe*; notes were sent by the petitioner to *Blythe*, but never exchanged, as bankruptcy intervened, and they were stolen from *Blythe*, and never formed any item in any settlement of accounts between *Blythe* and the assignees. Held, the petitioner could not recover the value of the notes from the assignees.

Mr. Bethell and Mr. Paynter for the petition.

Mr. Swanston and Mr. Montagu for the respondents.

Per Curiam:—

This is entirely a question of fact. The petitioner has not proved that the money in question was not in the stolen parcel. The Court would have no hesitation in ordering as prayed, if the petitioner had proved that the money was in the hands of *Blythe* when the assignees interposed the interdict (a) in Scotland. If the money were not in the parcel, it could not have come to *Blythe*; if it were in the parcel, it came to *Blythe's* possession, but was stolen before the interposition of the assignees.

The money did not form any part of the funds when the assignees interfered, or when the account was taken between *Blythe* and the assignees.

Petition dismissed.

(a) Injunction.

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July 30,
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Ex parte TURVILLE and others. — In the matter of
MILLER.

Quære, whether
the Court have
jurisdiction over
the executor of
an assignee?

IN July 1819 a commission issued against *Miller*. *Neal* was the petitioning creditor, and was chosen sole assignee.

Part of the bankrupt's property was mortgaged to *Neal*. This, with other property, was put up for sale by *Neal* in his character of assignee, without any order of the commissioners, which would have been necessary if he had sold as mortgagee. The mortgaged property was bought by an agent of *Neal*, without the usual leave of the Court. *Neal* deducted the amount of the purchase money from his proof. This proof referred to the mortgage, but *Neal* did not give it up; he received dividends, and signed the certificate.

A petition was presented, stating the facts of the purchase without leave, and also charging *Neal* with having received monies as assignee for which he had not accounted. It was heard on the 5th of July 1833, when the Court ordered the property to be resold, subject to *Neal's* mortgage, *Neal* having liberty to bid; and all further directions and costs were reserved. (a) A resale took place, and the property was bought by other persons for much more than *Neal* had originally given. On the 27th of December 1833 *Neal* died, leaving the respondents his executors. These executors joined in indentures, by lease and release of the 7th and 8th of July 1834, being a conveyance to the purchaser of the property so resold.

This was a petition by one of the assignees chosen

(a) See *ex parte Turville*, 3 Dea. & Ch. 350.

since *Neal's* death, stating the former petition, and praying that *Neal* might be declared to have forfeited his mortgage by having proved without giving it up (*a*); that all costs might be paid by *Neal*, and that he might account.

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Mr. *Montagu* for the petition.

Mr. *G. Richards*, for the respondents, objected that the Court had no jurisdiction over the executor of an assignee in any case; certainly not in this, as he had no assets.

Mr. *Montagu*, in reply:—

Admitting the Court had no jurisdiction to have proceeded in the first instance against an executor, here the order was made on *Neal* during his life, and may be enforced on the executor after *Neal's* death. In *ex parte Lane*, 1 *Ath.* 89, Lord *Hardwicke* charged the executor of an assignee with payment of sums for which the assignee had not accounted. In *ex parte Wackerbeth*, 2 *Gl. & J.* 151, on appeal from *Buck*, 495, the representative of a deceased assignee was sought to be charged with interest, and no objection was taken as to the jurisdiction.

The executor has executed the deed of conveyance to the new purchaser, thereby submitting to, and waiving all objections to the jurisdiction. In *ex parte Jackson*, 5 *Ves.* 358, on a question whether the Court had jurisdiction to compel a second mortgagee, not coming in under the bankruptcy, to join in a conveyance, Lord *Roslyn* said,

(a) See *ex parte Greenwood*, 1 *Jac. & Walk.* 425; and *ex parte Buck*, 327; *ex parte Barclay*, *Soloman*, 1 *Gl. & J.* 25.
1 *Gl. & J.* 272; *ex parte Hopley*,

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"I will think of it. Let the fact be inquired into, if the second mortgagee was applied to by the commissioners. If he was present at the time the order was made, and suffered the sale to go on, it would be too much to permit him to lie by, and take the objection afterwards."

Here a compromise was proposed, and the petition was ordered to stand over a short time. Nothing more was said about it. (a)

(a) The following is in the handwriting of Lord Eldon, and inserted in Mr. Barber's copy of *Eden's B. L.*:—

"Hamilton Place.

"*Re Abbey*, 8th February 1826.

"In this case, as I understand it upon reading it again, the assignee of the bankrupt dies; and the property, which in the course of the bankruptcy had been assigned to him, being I suppose, as the papers represent, since vested in one of the bankrupts as his personal representative; viz. the bankrupt now sought to be committed for not executing an assignment of that property to new assignees.

"But considering this matter, I wish Mr. *Pensam* to see if he can find any instance of an assignee's personal representative being compelled, by an order upon a petition in bankruptcy, to assign the estate which he has in the character of a *personal representative* of a deceased assignee.

"In this case an order is made on *all necessary persons*; but that is done, in practice, where necessary persons have no demands against the estate; or are not bills, *in practice*, necessary in such cases?

"It is true, that in this case, the personal representative is the bankrupt. But, under commissions of this date, could a bankrupt be compelled to execute? and if not, would his becoming a personal representative impose an obligation on him to be enforced *by petition* to do so?

"The Chancellor will thank Mr. *Pensam* if he can give or procure him any information, founded on practice, that applies to such a particular case as this."

In *ex parte Crome, Mont. & Mac.* 381, it was held that there was no jurisdiction to compel the personal representative of an assignee to account for the personal estate of the bankrupt in his hands. And see *Saxon v. Davis*, 18 Ves. 80, S.C.; 1 Rose,

Ex parte WILLIAMS and others, assignees, &c. — In the matter of WEINHOLT.

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THE petitioners were assignees. A suit had been instituted in which they were made defendants; a reference was made to the Master, who reported that it would be to the benefit of all parties that a compromise should take place. The Lord Chancellor doubted his jurisdiction to order this with respect to the assignees; and this was a petition praying that this Court would direct them to compromise the suit.

The Court will not lend its sanction to a compromise of a suit by the assignees, though the Master reports it would be for the benefit of all parties.

Mr. Swanston and Mr. Bacon for the petition.

Per Curiam :—The Court will look into the case, and make such order as shall be proper.

The Court subsequently ordered that the Lord Chancellor's order might be registered in the Court of Bankruptcy. That was the only order made.

Ex parte WATKINS.—In the matter of KIDDER.

C. of R.
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THIS was a petition by the person entitled to the equitable interest of certain shares in the Economic Assurance Office, standing in the name of the bankrupt in the books of the office.

The petition stated, That the petitioner was in 1827 the holder of two shares in the stock and property of the

Where shares of an insurance company are held in the name of the bankrupt as trustee, they are not in his reputed ownership.

79; and *ex parte Solarte, Mont. Lane, 1 Atk. 89*, being cited, the Vice Chancellor said, "the case

What is notice to the office?

In *ex parte Crowe, Mont. & cited from Atkins* is too vague to be acted upon."

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company of the Economic Assurance Office, London, which shares then stood in the name of the petitioner in the books of the company.

That being desirous to invest further money in the purchase of six other shares in the said stock and property, he accordingly in the month of June 1827, through the agency and assistance of *Lancelot Brough Allen esq.* one of the directors of the company, purchased six other shares numbered, &c. at 250*l.* per share.

That by the rules and regulations of the company, no person, except he be a director, is capable of holding in his own name, unless by marriage, will, or administration, more than two shares in the stock and property of the company.

That in case any person is desirous to become the actual proprietor of more than two shares, the additional shares must therefore be entered in the name of some other person in the books of the directors and company; provided always, that not more than two shares are entered in the name of any one person; but that no rule or regulation of the said company prevents any one person being beneficially entitled to more than two shares in the said company, and that many shares were so held by the beneficial owners in the names of other persons as their trustees, or on their behalf.

That the petitioner being informed by *Lancelot Brough Allen* of such rule and regulation, and of the mode in which it was therefore necessary and usual that any shares beyond two — of which he might be the owner — must stand, applied to *Kidder*, the bankrupt, and requested him to allow two of the said six additional shares, which petitioner was desirous of purchasing as aforesaid, to be entered in the name of the said *Kidder* in the books of the directors and company, and also requested *Kidder* to hold the same in trust for the petitioner.

That *Kidder* acceded to this request; and accordingly petitioner applied to the office and caused two of the shares to be entered in the books and company of the said office in the name of *Kidder*; that petitioner alone paid the whole price for the two shares as well as for the other four shares, and all expences.

That it was well known to the said Lancelot Brough Allen and to Mr. Naylor, the then actuary of the said company, that such shares, though held as aforesaid, were the property of the petitioner.

That immediately after the said two shares were so entered as aforesaid in the books in the name of the said *Kidder* as the proprietor thereof, he duly made and delivered to petitioner a declaration of the trusts thereof, bearing date the 12th day of June 1827, viz.

"I the undersigned, *John Kidder* of, &c., silver-smith, do hereby declare that the two shares mentioned standing in my name in the Economic Assurance Office were purchased and paid for by *G. P. Watkins* of, &c. with his own monies and for his own sole benefit; that my name is made use of in trust for him, his executors, administrators, and assignees: and I do hereby engage to assign the said shares to him, or to whom he shall appoint, at his expence, whenever required. Dated 12th day of June 1827.

JOHN KIDDER."

Witness, T. T.

That *Kidder* duly received the dividends on the said two shares, and immediately regularly accounted for or paid over the same severally to the petitioner; and that the said *Kidder* acted in all respects according to the direction of the petitioner in his character of nominal proprietor of the said two shares.

The solicitor to the assignees deposed that he, having applied to the resident director for the purpose of ascertaining the circumstances under which the transfer was made, was informed as follows:

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That *Kidder* was entered in the books, and was actually treated and considered on all occasions as the real and *bond fide* owner, and that no other person was recognized or known to the society, or known to have any controul or right of ownership in the said shares; that the society never received any notice or information that *Kidder* held the shares on account for *Watkins* or otherwise than as the actual owner thereof; that *Kidder* received all dividends and gave his own receipts, and that all notices, &c. were sent to him, and that *Kidder* possessed and could have exercised all acts of ownership in respect of such shares, and he attended meetings of the shareholders and voted as such, &c., and that the petitioner might have received the dividends under power of attorney.

The official assignee deposed that the two certificates and shares were in the possession of the bankrupt at his bankruptcy, and that he had been informed, and believed that such certificates were the only evidence of title to such shares.

These certificates were made out in the name of *Kidder*.

Mr. *Swanston* and Mr. *Romilly* for the petition.

Mr. *Montagu* for the respondent:—

The shares in question were in the reputed ownership of the bankrupt, as is proved by several cases. In *ex parte Monro*, *Buch*, 300, a bond was assigned and delivered to a third person, but no notice having been given to the obligor, it was held to be in the reputed ownership of the obligee at his bankruptcy. In *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 *Russ.* 1, a *cestuique* trust assigned his interest in a sum of money to *A.*, and no notice was given to the trustees; subsequently, the *cestuique* trust made a second assignment to *B.*, who made inquiry of the trustees, and was informed there

was no prior incumbrance, he thereupon gave the trustees notice of his purchase, and it was held that *B.* had better equity than *A.* to the possession of the fund, and that the assignment to *B.*, though posterior in date, was to be preferred. In *Nelson v. The London Assurance Company*, 2 Sim. & Stu. 292, the directors of the company assigned their shares to the company to secure debts, and empowered the company to sell the shares: one of the company became bankrupt, before the power was exercised, and the shares were still standing in the director's name: the shares were held to have been in his reputed ownership. That case is very strong against the petitioners, because there can be no doubt but that the whole company had notice of the equitable assignment. In *ex parte The Lancaster Canal Company*, 1 Dea. & Ch. 411, it was decided, that where the proper formalities for a transfer of shares had not been strictly complied with, the ordinary mode of making such transfer would not constitute an equitable mortgage.

It *ex parte Stright*, Mont. 502, there was a regular letter sent, containing the information that the shares belonged to *Stright*.

And lastly, in *ex parte Carbis* the Court held, that a conversation, wherein the agent of the holder informed the clerk of the company of the transfer, was not sufficient to prevent the shares being in the reputed ownership. (a)

(a) C. of R. February 19, 1834.
Ex parte Carbis, in *re Croggon*.

This was a petition by the assignee of a policy of insurance, that it might be delivered up to him. After the bankrupt had delivered the policy to the petitioner, the latter sent his agent to the office to pay the premium;

in the course of conversation the agent informed the clerk, that the bankrupt had assigned the policy to the petitioner.

It was also alleged at the bar, that a letter had been sent containing notice, but no proof of that fact was given.

Mr. *Swanston* and Mr. *K.*

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Then what "notice" was there in this case? The petition alleges "that it was well known to the said

Parker for the petition:—In *ex parte Stright, Mont. 502*, the bankrupt deposited two policies with *Worger*, who sent a letter, stating, "I am the holder of the under-mentioned policies, and shall feel obliged if you will inform me what sum the office will give if they are delivered up to be cancelled." This was the only notice the office received, and it was held sufficient to entitle *Worger* to the policies. That case will govern the present. The Court there said, the slightest circumstance of notice is sufficient.

The CHIEF JUDGE:—Taking it for granted that a verbal notice is enough, if given as notice, is it enough if said in a mere conversation, in which the party did not intend to give notice?

Mr. *Montagu* for the assignees:—The question is, whether notice was in fact given? A mere loose conversation does not amount to notice. *Ex parte Monro, Buck, 500*, is the leading case in questions of this nature; it was held that the assignment of a bond debt, accompanied by delivery of the bond without notice to the obligor was not valid as against the assignees. The conversation here was not intended as notice.

Mr. *Swanston* in reply:—The

letter sent in *ex parte Stright* was not intended as a notice, and yet it was held sufficient.

The CHIEF JUDGE:—

The intent is immaterial, if it be clear that notice is in fact given.*

In that case the Court did no more than support the usual doctrine of equity. No conveyancer would advise that a title could be accepted which was effected with such a notice as the present. In *Smith v. Smith*, a case lately decided in the Exchequer†, *A.* made advances to *B.* a trader, and afterwards took from him as security an assignment of an equitable life interest in stock and other property vested in three trustees under a marriage settlement, there being rumours as to the solvency of *B.* *A.*, in the course of conversation subsequently to the assignment, and not with a view of giving validity to his security, mentioned to one of the trustees, who was not acting trustee, that he was secured by the assignment: and it was

* But we think that the purpose for which the notice is given, if a notice were in fact given, is immaterial. Per Lord *Lyndhurst, Smith v. Smith, 2 Crompt. & Mee. 233.*

† Since reported, 2 *Crompt. & Mee. 231.*

Lancelot Brough Allen, and to *Mr. Naylor*, the then actuary of the said company, that such shares were held as aforesaid, and were the property of the petitioner." Can it be contended for a moment that this is notice to the office? But the solicitor to the assignees deposes

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held that this communication was a sufficient notice to prevent the interest of *B.* from passing to the assignees, as having been in his order and disposition.

In notices the purposes for which they are given must be considered. In this case it is a question of fact, whether or not the letter did contain any notice. The letter is not before the Court. Then, independently of the letter, here is a mere accidental conversation, in the course of which it slips out, the policy was deposited. The clerk at the insurance office would not notice this, as it was not intended as a notice. *Smith v. Smith** differs from the present case; the only question there was, whether the communication brought the fact within the personal notice of the trustee? Here the question is, whether notice was given to the officer?

Sir John Cross:—Was notice given? All we know is, that an agent of the petitioner went to the office, not to give notice, but to pay a premium. If a man walks into a banker's, and says accidentally that a bill is disho-

noured, that is not notice. There was notice in this case; the fact of a deposit was a mere matter of conversation, and alike amounts to nothing, whether that conversation took place in the office, in a house, or in the streets. But it was contended that this conversation was notice to the whole office, as notice to one trustee was enough in *Smith v. Smith*.* But would a conversation with a servant to a trustee be notice to the trustee?

Sir George Rose:—The doctrine of notice in equity is founded on totally different principles to those applicable to cases of reputed ownership in bankruptcy. Thus any notice to a purchaser is enough to put him on inquiry. The assignment of a policy is an equitable assignment, and there is no title in equity till notice thereof has been given. It is not necessary such notice should be formal, nor is it necessary that it should be in writing, but it must be a distinct notice.

The case stood over that the letter might be sought for; if no such letter, then the petition to be dismissed.

* 2 *Crompt. & Mee.* 231.

* 2 *Crompt. & Mee.* 231.

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that he was informed at the office that no notice was ever given to the society.

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The 79th (a) section, which relates to trust property, is confined to cases where property stands in the bankrupt's name as trustee; here the shares stood in his name, not as trustee, but as his own, and the trust was secret.

Mr. *Swanston* in reply was stopped by the Court.

The CHIEF JUDGE:—Where there exists a custom which is known that property standing in the name of any one may only be his nominally, while the real right may be in another, would the reputation of ownership attach to the mere nominal possession? Here the property follows the title. His title is as trustee; he holds as trustee; he had a right to hold. The mischief the act intended to remedy was, where the title was in one person, the possession in another, as decided by Lord *Eldon* in *ex parte Martin*, 2 *Rose*, 332, S. C. 19 *Ves.* 494.

(a) "That if any bankrupt shall as trustee be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues, and profits, dividends, interest, or produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such of them as shall be then subsisting and capable of taking effect; and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct."

The assignees, however, contend, that as the shares were suffered to stand in the name of the bankrupt, they passed to them under section 72 of 6 G. 4. c. 16. No doubt shares in an insurance office, as other choses in action, are goods and chattels within the meaning of that clause; but it is equally clear that they would not pass under that clause if held in trust for another. Fraud is not alleged. The shares were entered in the name of *Kidder*, with the knowledge of one of the directors, pursuant to a practice known and permitted. I do not see that the clause as to trust property is confined to cases where the bankrupt is actually entered on books, &c. as a trustee. Bank stock is not so entered. The shares standing in the name of the trustee was quite consistent with the legal title which was in him, as Lord *Eldon* said in *ex parte Martin*, 2 *Rose*, 332, S. C. 19 *Ves.* 494.

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Sir *John Cross* : —

In this case the bankrupt had possession, and he had a legal title to the possession; consequently the seventy-second section does not apply.

It might perhaps create a distinction if *A. B.* sold goods or chattels, and *A. B.* remained in possession, and executed a deed of trust in favour of the purchaser. There, though the possession and legal title would be in the same person, yet the circumstances of the case might create an exception, and bring it within section 72.

Sir *George Rose* : —

The notice to the director and to the actuary is certainly very material; without that I should doubt the effect of the declaration of trust. The seventy-ninth section does not apply to this case, it merely enables a party to apply by petition instead of bill.

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The question is, was the bankrupt a trustee? If so, the assignees have no title to the property. But whether he were trustee or not might be a question. If this were a mere delivery of a chattel without more, the title to it might vest in the assignees under a subsequent bankruptcy. But if the owner were an infant, or a feme covert, then, however hard on creditors, and however much they might be deceived, yet as the possession could not be with the consent of the true owner thereof, it would not pass to the assignees. If it be not a dry chattel thus to be operated on by actual delivery of possession, but a chose in action, which cannot be delivered, the question is, whether at the time of the bankruptcy the equitable title was complete as against the assignees, who now have the legal title which the bankrupt before possessed? It has been decided, that though a chose in action have been assigned so far as contract goes, yet if no notice was ever given as against those persons against whom the assignment is to operate, that the property goes to the assignees. As to bank stock, all the world knows, and indeed it is acknowledged as a conclusion of law, that the Bank takes no notice of trusts; and a notice there of a trust would be nugatory. But is that the case when notoriety may be given by notice?

As to the written declaration of trust, would that alone have prevented the bankrupt selling the property, or from holding himself out as the reputed owner? I should have some difficulty in saying that this property was not in the reputed ownership, if the right of the petitioner depended on the declaration of trust only.

It is not alleged that the office refused to attend to notices; if that had been the case, the petitioner might perhaps have urged, "In taking a declaration of trust I have done all I could usefully do: notices to the

office would have been idle and nugatory." But it has not been proved that this office refused to attend to notices; therefore, unless there had been notice in this case, I should have some difficulty in saying that the property in question did not pass to the assignees.

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The CHIEF JUDGE :— If the question depended on notice, I should say there was enough; but my judgment was founded on the existence of the declaration of trust alone.

Order, That the assignees deliver up and convey the trust property. (a) No costs.

Ex parte LAVENDER.— In the matter of
LAVENDER.

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Sept. 15, 22,
& 23.
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THIS was a petition by the bankrupt stating that he was not a trader, and had not committed an act of bankruptcy, and praying that the insertion of the advertisement in the Gazette might be stayed, and the fiat superseded.

The Court of
Review will
stay the inser-
tion of the ad-
vertisement in
the Gazette.

Mr. Temple, for the petitioning creditor, applied to adjourn the hearing, that he might have time to produce witnesses.

The CHIEF JUDGE :

I shall first hear the witnesses for the petition, and if they establish a *prima facie* case, I will stay the advertisement in the Gazette, and then consider whether it will be expedient to give time to produce witnesses on the main question of the supersedeas.

(a) An appeal is pending from this decision.

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Mr. Serjeant *Wilde*, with whom was Mr. *Montagu*, having proceeded to open the case, stated he laboured under great difficulty, not knowing what were the acts of bankruptcy, &c., and he feared he might consume much time to no purpose in guessing what these were.

The CHIEF JUDGE said it would save much time, if Mr. *Temple* would consent to have the depositions now read, as Mr. *Temple* must eventually read them as part of his case.

To this Mr. *Temple* consented, and they were read accordingly.

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One of the depositions was by the drawer of a bill accepted by the bankrupts, and not yet due. It concluded with the usual affidavit, that the deponent was not creditor of the bankrupt.

Mr. Serjeant *Wilde* objected, that his deposition could not be read as evidence; he may be called on to pay the bill, and is, consequently, an interested witness; he therefore should be called *vivâ voce*, and examined as to these facts, which, if as stated, incapacitate him as a witness in the proceedings.

The CHIEF JUDGE:—As the deponent swears he is not a creditor, and there is no evidence that he is, I cannot assume him to be such. This evidence must be read.

The deposition was read.

He was afterwards called to be examined *vivâ voce*, on his *voire dire* in answer to a question put by Mr. Serjeant *Wilde*, he said, “I had a bill in my hands about a week or twelve days before it was due, I have paid it away to a Mr. P.” On this bill the bankrupt was liable.

Mr. Serjeant *Wilde* :—This witness cannot be examined, being liable for the difference between the amount of dividends to be paid on the proof to be made by the present holder of the bills, and the sum for which it is drawn.

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Mr. *Temple* :—The practice in bankruptcy has always been to read the affidavits of all persons, whether interested or not, but the present witness is not interested in the bankrupt, as he would not be liable to the bankrupt, but to the holder of the bill, as in *Williams v. Stephens*, 2 *Camp*. 300.

Mr. Serjeant *Wilde*, in reply :—

The question is not whether the affidavit of this witness could be read, which practice has established in the affirmative, but whether he can be examined *viva voce* — a very different question.

The 3d section of the Bankrupt Court Act declares that there may be an appeal from this Court “on matters of law and equity, or on the refusal or admission of evidence”; now, if this Court is, when examining *viva voce*, to pay no attention to the rules of evidence prevailing in all other Courts, and to admit the evidence of all persons, whether interested or not, it is impossible that any question as to the refusal or admission of evidence, which was contemplated by the legislature, should ever arise.

That he is not a creditor of the bankrupt does not enable the Court to receive his evidence, he cannot be heard if in any way interested in the fund created by the bankruptcy.

The CHIEF JUDGE :—

No doubt the affidavit of this party would be evidence. But as the act now authorizes this Court to examine *viva voce*, and as the 3d section introduces a new state

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 of
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of things, I should have great difficulty in saying that any one could be examined *viva voce* in this Court whose evidence would not be received in a court of law.

My present impression is, that this witness cannot be examined, but being an important point arising for the first time, I will consider it.

Cur ad. vult.

Sept. 23.

On a *viva voce*
 examination on
 a petition to
 supersede, a
 creditor is not
 a competent
 witness.

This day another person was called as a witness, who admitted he was a creditor, whereon

Mr. Serjeant *Wilde* objected to his evidence being received.

The CHIEF JUDGE:—

If there had been no decision either way, I should rather have suffered the objection to go to his credit than his competence.

It certainly depends on the circumstances in which the creditor is placed, whether it be or be not his interest that the bankruptcy should be superseded. Some creditors would have an interest to support the fiat; others, as judgment creditors, under certain circumstances might have an interest to supersede.

But the rule which excludes the evidence of a creditor is founded on the principle, that a creditor must have an interest to support the bankruptcy; and it has so often been decided that creditors are not admissible, as to leave me no option. I am bound by the decisions to declare, that the evidence of this witness cannot be received. *Williams v. Stephens*, 2 Camp. 300; *ex parte Osborne*, 1 Rose, 387, S. C. 2 Ves. & B. 77. And in another case, during the same sittings as *ex parte Osborne* was decided in, *Williams v. Stephens* was cited, whereon Lord Eldon said, “It is not enough that the creditor has not availed himself of the commission to be a com-

petent witness, it ought to be certain he never will." And in *Crooke v. Edwards*, 2 Stark. 302, an objection was taken to the competency of a creditor, and the case of *Adams v. Malkin*, 3 Camb. 543, was cited, where Lord Chief Justice Gibbs allowed the objection; and the case of *Williams v. Stephens* was also cited, whereon Lord Ellenborough, retracting from his former opinion, said that he was inclined to the opinion expressed by the Lord Chancellor in *Williams v. Stephens*, for the commission was to be considered a benefit to the witness, since it brought a divisible fund within his reach, and by supporting the commission he enlarged the means of satisfaction. It then becomes clear from these authorities, that if this were an issue the witness would be incompetent; but it is argued, that this being a petition to supersede creates a difference, and that the rules in bankruptcy as to evidence are not so strict.

When affidavits were used before the Lord Chancellor as to facts, they were used in order to enable the Lord Chancellor to form an opinion whether the point were clear or doubtful; if it appeared doubtful, an issue or an action was ordered, and the verdict therein acted as a guide to the judgment of the Lord Chancellor. (a)

If then this Court decides a case on a *vivâ voce* examination, that examination must be guided by the same rules as of sitting at the trial of an issue, and unless the petitioning creditor can support his fiat by evidence which would be produceable at an issue, I must supersede. The witness in question, being a creditor, cannot therefore give evidence.

Objection allowed, and the fiat was superseded.

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Ex parte
LAVENDER.
In the matter
of
LAVENDER.

(a) It is presumed this observation refers to something said by the Lord Chancellor, in directing the issue in this case of *Williams v. Stephens*, 3 Camp. 300.

C. of R.
Sept. 23,
1834.

An application to be discharged from custody, on the ground of the insufficiency of the commissioner's warrant, must be by petition. (a)

Ex parte JONES. — In the matter of JONES.

MR. JONES stated, that this was a motion that the bankrupt might be discharged from custody, on the ground of the insufficiency of the warrant signed by the commissioners.

Mr. Temple, *contra*: — This not being an application to discharge a bankrupt who has been attending to be examined, &c., the application must be by petition, supported by affidavits in the usual way.

Let the petition be answered, filed, and served, and the affidavits filed, then I will appoint an early day for its being heard.

Motion dismissed. Costs reserved.

(a) Q. Is not this the first application to discharge, except on habeas corpus?

Doubt seems to have been entertained, whether the Chancellor can discharge from commitment by petition. From the following authorities it will probably appear that the Chancellor had this power, although in practice it has not of late been exercised. *Ex parte James*, 1715, 1 P. Wms. 619, cited in *Crowley's* case, 2 *Swanston*, 30, which see; *ex parte Brailsford*, 1725, *Crowley's* case, 2 *Swanston*, 31; *ex parte Mace*, 1728, *Crowley's* case, 2 *Swanston*, 38; *ex parte Lingood*, 1742, 1 *Atk.* 240, see *Crowley's* case; 1797, there seems to have been some case in this year, see 2 *Swanston*, 29; *Taylor's*

case, 1803, 2 *Vesey*, 330. In this case the bankrupt was brought up on habeas corpus. Mr. Cooke moved that he should be discharged, observing, that a petition was not the proper course: to which the Lord Chancellor assented. To what extent this assent is to be considered as authority it does not seem necessary to inquire. The bankrupt was not brought up upon a petition; he was in court upon a writ of habeas corpus, and being there, it is clear that the proper course was to move for his discharge. Considering this assent as some authority, Mr. *Vesey* refers to the case of *Horne v. Lanoy*, 1 *Dick.* 170. How far this case is any authority, the case itself will explain; it is a fol-

Ex parte ROBINSON. — In the matter of CASE.

THIS was a petition to stay the bankrupt's certificate, and to prove.

Mr. *Montagu* for the bankrupt: —

There are several preliminary objections.

1st, The petition does not state that the petitioner is a creditor, which is essential, *ex parte Cutten, Buck*, 69; the affidavit in support does, but that is not sufficient, as all facts must be equally stated on the petition and affidavit, *ex parte Cundall*, 1 *Gl. & J.* 37.

Mr. *Temple*, *contra*.

The CHIEF JUDGE: —

In *ex parte Cundall*, 1 *Gl. & J.* 37, the ground neither appeared in the petition nor in the affidavit in support, but only on the affidavit in reply.

I am always reluctant to dismiss or stay the hearing of a petition on a preliminary objection. Here the only reason the petitioner has for wishing to stay the certificate is, that he desires to prove, which leads to an unavoidable inference that he is a creditor. I should not hesitate one moment to dismiss this petition, if I did

C. of R.
Sept. 26,
1834.

A petition to stay the certificate, and to prove, was presented. Held, 1st. It need not state that the petitioner is a creditor: 2d. It need not state when the debt was rejected: 3d. It need not state what debt was rejected.

lows: *Horne v. Lanoy*, 15th July 1752, 1 *Dick.* 170. An infant was arrested and thrown into prison for necessities; an habeas corpus was granted to bring him into court to have a guardian assigned. It was attempted by petition, which was thought by Lord *Hardwicke*, C., improper, and therefore it was moved for. *Ex parte Tomkison*, 1804, 10 *Vesey*, 106. Whether the refusal by the Lord Chancellor to make any order was because the application was upon petition, or because the petition was without foundation, the report does not state. *Ex parte King*, 1805, 11 *Ves.* 425; *ex parte Harris*, 1811, 18 *Ves.* 237; *ex parte Oliver*, 1812, 1 *Rose*, 407; *Crowley's case*, 1818, 2 *Swanston*, 16.

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 of
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not perceive, on the face of the petition, that the petitioner must be a creditor, and that he must have intended to represent himself as a creditor. If this were a petition to stay for gaming, for instance, I should dismiss it.

Mr. Montagu : — The next objection is, that the petition does not state when the debt was rejected. His debt was rejected at the first meeting, all the other creditors have signed the certificate, and this petition was not presented till the twentieth day after the certificate had been advertised in the Gazette. This is such laches as to deprive him of any right to stay the certificate, *ex parte Smith*, 1 *Gl. & J.* 195.; *ex parte Bostock*, 1 *Dea. & Ch.* 383. In *ex parte Anderson*, 1 *Rose*, 93, Lord *Eldon* says, “ I have often thought it a hardship,—it is not for me, but for the legislature, to relieve it,—that when the creditors requisite, in number and value, have certified their consent to the allowance of the bankrupt’s certificate, a person meaning to oppose it should not state candidly the objection, and give the bankrupt an opportunity of setting himself right, but, on the contrary, should lie by, suffering him to solicit all the creditors, perhaps, but himself, and then meet him here, ignorant of the objection, and perhaps unprepared, from his poverty, to defend himself.

“ In this case the debts are 215,901*l.* 0*s.* 6*d.*, and of those, 164,779*l.* have signed; and the law tells me, that where creditors, not being bound so to do, but acting from their own free will, certify to me the bankrupt’s conformity, and where the commissioners also certify to me that three fifths of the creditors in number and value have signed, and that they, speaking judicially, have no reason to be dissatisfied, the Great Seal is bound, unless the law and practice say otherwise, to allow the certificate; and I own I was surprised at hearing that the

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law in this respect was relaxed, because I ever thought that the Court had gone a great way in requiring more to be done than the letter of the law requires."

I.

The CHIEF JUDGE:— The petition is certainly informal in not stating when the debt was rejected, but as the fact must appear on the affidavit, I ought to hear the petition.

Mr. *Montagu*:— Another objection is, that the petitioner does not state *what* debt he offered to prove. Was it the debt referred to in the petition, or some other debt? *Ex parte Curtis*, 1 *Rose*, 274.

The CHIEF JUDGE:— I will not dismiss the petition on that ground.

Objections over-ruled.

Mr. *Temple* then argued the petition on the merits.

Mr. *Montagu*, *contra*.

The CHIEF JUDGE:—

In this case the petitioner tendered a proof, and claimed to be a creditor on the balance of accounts; this proof was rejected, because that balance had not been ascertained, and the entry made by Mr. Commissioner *Hobroyd* on the proceedings is, "Proof rejected, it appearing that the applicant and the bankrupt had been engaged in a joint adventure, that the accounts had not been taken, and that there were divers outstanding debts due from such adventure."

Such was the debt tendered before the commissioner; but the petitioner now sets up a totally different claim; he states he is a creditor for 1,100*l.* on a private account, and that the commissioner rejected that debt because of the outstanding partnership account.

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Ex parte
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As to the partnership account, it is clear that the petitioner would not be entitled to prove the balance until he — being the solvent partner — had paid the creditors of the partnership, and he is not entitled to stay the certificate, because he could only stay on the ground that he is prepared to prove, which he is not. As to the alleged private debt of 1,100*l.*, if he had proved that the bankrupt was indebted to him on a private account, and that the commissioner rejected his proof because of the outstanding partnership account, then I might have been induced to interfere; but no such case is established.

Petition dismissed, with costs. (a)

C. of R.
Sept. 26,
1834.

Ex parte RAMSAY. — In the matter of RAMSAY.

If the sole assignee be a creditor, and sign the consent to a supersedeas, he need not be served with the petition.

THIS was a petition to supersede, with consent of creditors: there was but one assignee, who was one of the consenting creditors. Held the assignee need not be served. No other person was served.

Supersedeas ordered.

C. of R.
Sept. 26,
1834.

Ex parte HAWES. — In the matter of GRIFFITH.

Unopened fiat
not amended.

MR. MONTAGU applied, that a fiat not opened might be amended. The bankrupt was described as of Cateaton Street. His house stood at the corner, and

(a) In *ex parte Johnson*, 1 *Atk.* 81, a petition to stay the certificate, and prove a debt depending on an account not settled, was dismissed as to the certificate. In *ex parte Hadley*, 1 *Gl. & J.* 193, a certificate was stayed, on the petition of one partner of the bankrupt, until the partnership accounts should be taken, no laches being imputable to the petitioner.

fronted both Basinghall Street and Cateaton Street, and the entrance was formerly in Cateaton Street; six months ago the entrance was changed to Basinghall Street. It was wished to amend the fiat by substituting Basinghall Street.

The CHIEF JUDGE:—I could only say, “let the fiat be amended if the Lord Chancellor think fit;” but as the docket papers are wrong, the Lord Chancellor would have nothing to amend by; it is therefore absolutely necessary to strike a new docket. It is better, therefore, to follow the usual practice, and have a new fiat.

1834.

Ex parte
HAWES.In the matter
of
GRIFFITH.

Ex parte KIRKMAN.—In the matter of KIRKMAN.

THIS was a petition to supersede with consent, presented one day before the 42d day, on the grounds that there was no act of bankruptcy or petitioning creditor's debt.

The bankrupt up to 1831 resided at New Basford, Nottingham. In June 1831 he went to America with his wife and son, with a view of staying there a short time in order to ascertain whether they should like to reside there, he intending to return again to England before finally taking up his abode in America. The petition stated that he was, in a great measure, influenced by the delicate health of his son, and a desire to give him the benefit of a sea voyage, and of residence in another climate; but that his residing abroad being uncertain, he did not give up his house at New Basford, nor sell his furniture, but the house and furniture were kept up for a year for his accommodation in case of his return to England. Before his departure he was indebted to various persons in the sum of 740*l.* exclusive of 1,300*l.* on mortgage, but was possessed of property amounting to between 3,000*l.* and 4,000*l.*, being more than suffi-

C. of R.
Dec. 12,
§ 13,
1833.

The bankrupt's petition to supersede, for want of the requisites, cannot be heard till he has surrendered, though he be living in America.

1833.
Ex parte
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cient to pay his debts. Part of this property consisted of an interest in a freehold estate at New Basford, subject to a mortgage for less than its value, and the annual rents were sufficient to pay the mortgage. Previous to his departure he had paid off debts amounting to \$37*l.*, and made provision for the remainder, amounting to 403*l.*, by setting apart the rents of his freehold estates, after paying the mortgage interest. Long before he went to America his intention of going had been the subject of general conversation in the neighbourhood of his residence, and of the residence of his creditors; and when he went, the fact of his departure was not intentionally withheld from any of his creditors, nor had there been the least intention on his part to delay them, or to dispose of his property to their prejudice. Having sustained great injury from sea sickness, he did not return again to England as he had intended. The petitioner also stated, that all his creditors whose debts still remained unliquidated were well satisfied of his integrity, and had not yet required payment of their respective debts, and would not, until it should be convenient to him to pay them.

That in 1828 he became joint surety with *Roberts* for *Simpson*, by entering into two joint and several promissory notes for 100*l.* and 90*l.* to *Prichet*, the whole amount of which notes was paid to *Simpson* by *Prichet*; and that he also became one of several sureties for *Simpson* on other promissory notes for money advanced to *Simpson* by various money clubs; and that, thinking *Simpson* would discharge these notes, he omitted to inform the agent he authorized in England to pay his debts, that he was surety for *Simpson*.

In September 1833 a fiat issued against the petitioner by *Prichet*. The petitioner denied that there was any debt due to *Prichet* to support the fiat, as fresh secu-

rities had been taken by *Prichet* for 190*l.* without petitioner's knowledge. The debts proved or claimed amounted to 403*l.*, and, independently of *Prichet's* debt, were nine in number; five of them amounted to 144*l.* only, and the remainder were debts proved against the petitioner as the surety for *Simpson*.

All the creditors of the petitioner who had proved or claimed consented to the annulling the fiat.

The petitioner stated he was ready to pay any other creditor—who had not proved—the full amount of his claim.

Prichet had tendered proof of his debt, but it was rejected by the commissioner. The petitioner declared he was nevertheless willing to pay the debt claimed to *Prichet*, or into Court, together with the costs attending the fiat, and to pay the other creditors who had proved against him as surety the amounts of their debts, if the Court thought proper.

The petitioner denied having committed any act of bankruptcy, and alleged that the freehold estate at New Basford was alone worth at least 2,500*l.*, which, together with his other property in England, was more than adequate to pay in full every claim upon him, and leave a considerable surplus.

Mr. *Bethell*, for the petitioning creditor, took a preliminary objection to the hearing the petition, on the ground that the bankrupt had not surrendered. In *ex parte Crouther*, *Buck*, 480, and *ex parte Gardiner*, *Buck*, 458, and *ex parte Drake*, *Mont.* 486, S.C. 2 *Dea.* & *Ch.* 91, this rule is recognized; and in *ex parte Gardner*, the Vice Chancellor says, "the bankrupt never can be heard upon petition till he has surrendered." [Sir *John Cross* : — Either the Vice-Chancellor is misreported, or he was wrong in making use of the word

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“never,” as if the decision of a particular case were to have the force of a statute, binding in all cases.]

Mr. Bacon, *contra*.

Sir George Rose:—Objections which are strictly preliminary are only such as apply to defective signature or attestation, or to the jurisdiction, &c. Nevertheless it is usual to treat this as preliminary in order to save time.

After much discussion whether the petition should be heard,

Per Curiam:—The petitioner may open his case.

Mr. Bethell:—And then I shall demur or plead to the petition.

Mr. Montagu and Mr. Bacon, for the petition, having read the petition and affidavits, proceeded as follows:—A more important question than the present is seldom submitted to a court. The decision in *ex parte Drake*, Mont. 486, S.C. 2 Dea. & Ch. 91, is certainly directly against the present application, and, if that were the latest case, we could hardly venture to address the Court on a point which must then be considered as *res judicata*. The only remedy for those interested in the just administration of this part of the law would be by application to parliament; but, as the same point now awaits the decision of this Court in *ex parte Foulger* (a), we are relieved from that difficulty. [The CHIEF JUDGE:—In *ex parte Foulger* there had been a trial at law with a verdict against the commission, and it was not the petition of the bankrupt.] The question is, whether in this free country, a merchant on the other side of the Atlantic, who declares that he is not, in any event,

(a) Since decided and reported, *ante*, page 457.

amenable to the bankrupt laws, and that, if he were, he has committed no act of bankruptcy, can or cannot be heard on a petition to supersede till he pass over the sea to surrender to a fiat which is utterly invalid, and which will be annulled the moment he appears?

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Is it to be endured that a man is to be made a bankrupt, perhaps in pursuance of a conspiracy, and where, being abroad, it is impossible that he should surrender within the forty-two days, and then that he cannot petition unless he come here and surrender, and submit to have all his affairs sifted by being personally examined before the commissioner, when he may shew this Court that the fiat was an utter nullity.

[The CHIEF JUDGE : — Is there any case of an adverse application by the bankrupt to supersede for defects in the commission after the 42d day, and before surrender?]

There is not any such decision, but then it is high time that there should be one. If the decision of this case be to depend on authority, let the other side produce a case in which a person living in America was compelled to come over to this country to surrender to an invalid commission.

The rule is said to be, that the Court will not supersede without surrender, though there may be cases of exception.

But the present rule ought to be the exception, and the exception the rule. If a party be shewn to be dishonest, owing large sums, possessed of property, remaining out of the jurisdiction, and keeping the Court at arm's length, then that might be a case in which the Court would not supersede until he surrendered, and brought himself within the jurisdiction of which he sought the benefit.

If in the present case the petitioner were indicted for felony, no jury would find him guilty; and never having heard of the commission, he cannot be in con-

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tempt; therefore the two principal grounds of non-interference do not apply. Before the 42d day a petition before surrender lies; does not the bankrupt's being abroad place him in a similar situation, and form an exception to the general rule?

The subject may be considered, 1st. On principle; 2dly. On authority.

1st. As to principle, there is none. In *ex parte Cowan*, 3 B. & Ald. 123, a question was agitated whether the jurisdiction of the Chancellor existed after a commission had been superseded; upon which Lord *Tenterden* said, "The greatest injustice would result from such a conclusion; for then a person against whom a commission had issued, which was afterwards found not to be sustainable, and whose whole property had been taken from him by colour of it, must either bring an action at law, in which he might lose half the value for want of proof, or go through the slow process of a bill in equity for discovery and relief." To apply this to the supposed doctrine that a party cannot be heard till he come from America, may not the same words with propriety be used?

At different periods of time, various tribunals have attempted to oppose obstacles to a speedy termination of an illegal commission, upon an application by the person against whom it issued; but although they may have been sanctioned for a short period, they have always been ultimately over-ruled. About the year 1820 it was for a short time said, that the only remedy was by action, and that the Court of Chancery ought not to be troubled. This observation, made to an application by a person declared bankrupt, would not be made to an application made by a peer of the realm.

In *ex parte Trustram*, 1820, *Buck*, 550, and *Montagu's Annual Digest*, note 4 Y, 182, upon a statement to the Vice-Chancellor, that, on a petition by the bank-

rupt to supersede, there were contradictory affidavits, his Honor refused to hear the petition, saying, "that it must be tried at law."

But so very different were the opinions in the courts of common law upon this subject, that in *Mayer v. Pyne*, 2 Carr. & Payne, 92, Best, C. J., said, "I wish it never were competent in a writ of nisi prius to dispute the proceedings in bankruptcy; it would be much better to petition the Court of Chancery."

And by some supposed analogy to a suitor in equity being obliged in certain cases to clear his contempt, as it is called, attempts have occasionally been made to compel a person to surrender before he can be heard to state to the Court that its process has been abused. This exercise of power originated in the tendency of tribunals to increase their authority, and is punishment before hearing. "*Castigat auditque dolos.*"

2d. As to authority. There is no authority for any necessity to surrender before the 42d day, even supposing it to be just to require such surrender after the 42d day. There is no such necessity, whatever assertion may be made to the contrary.

When the extraordinary power to seize a trader's property upon an *ex parte* declaration of bankruptcy was first given to the Chancellor, it was supposed, as in justice it might be well supposed, that a merchant, who was to be condemned unheard, ought to have the right of staying, by the injunction of the Court, an abuse of its process.

Previous to the time of Lord *Hardwicke* there seems to have been a practice of entering a caveat to prevent the issuing a commission; see *Backwell's* case, A. D. 1683, 1 Vern. 153. This practice was censured by Lord *Hardwicke* in 1746 in *ex parte Parsons*, 1 Atk. 72, where, a petition by a trader, stating that he was not

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a bankrupt, and praying that no commission against him might be sealed until he had an opportunity of being heard by his counsel against the issuing thereof, was dismissed, the Lord Chancellor saying, "I do not approve of caveats against commissions of bankrupt before they issue. There have been some few instances, but I hope this will be the last; because it will be a great inconvenience in general, as it will give an opportunity to persons against whom the commission is taken out to make away with their effects." And this is now the settled law of the Court. In *ex parte Thompson*, 1790, 1 *Ves. jun.* 158, Lord *Eldon* says, "A commission of bankruptcy is a remedy which a creditor has a right to sue out." But although the right to issue is a legal right, the Chancellor will restrain its use to equitable purposes. *Ex parte Bourne*, 1826, 2 *Gl. & J.* 147. Such is the general principle by which the Court regulates itself. There is not, therefore, any stage of the proceedings in which the Court will not, if equity require it, interpose.

In *ex parte Williams*, 1813, 2 *Ves. & B.* 255, where it appeared to the Chancellor that there had been improper delay in proceeding to seal the commission, Lord *Eldon* declared, "that he would not seal it unless the commission issued within three days."

The different cases in which this interposition has been exercised may be thus considered;

- 1st. Before the commission is opened.
- 2d. Between the opening and adjudication.
- 3d. After the adjudication.
 1. Before publication.
 2. Between 1st and 2d meeting.

Before opened. In general it may be assumed that the Court will not interpose between the issuing and opening the fiat. In *ex parte Lanchester*, 1810, 17 *Ves.* 513, an application

was made to stay proceedings between the issuing and the opening; the Chancellor said, "the petitioning creditor has a right to a commission, and to proceed to an adjudication."

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In *ex parte Fletcher*, 1813, 1 *Rose*, 336, the Chancellor superseded a commission after it was opened, but before adjudication, on account of the lapse of time between the issuing and the opening.

Between open-
ing and adju-
dication.

In *ex parte Battier*, 1819, *Buck*, 427, the Chancellor superseded between the opening and the adjudication, because the commission was issued upon an equitable debt; and the Chancellor, admitting the rule that in general a commission could not be superseded before adjudication, said, "Where there is a charge of fraud the rule does not apply, as it is the duty of the Court always to put an end to fraud without loss of time." But although the Court will rarely interpose before adjudication, it will, if necessary, prevent the ruin which would ensue by an improper publication in the Gazette.

After adjudica-
tion and before
publication in
Gazette.

In *ex parte Fletcher*, 1813, 1 *Ves. & B.* 350, the Chancellor refused to interfere before the opening, but directed the proceedings to be laid before him immediately upon the declaration of bankruptcy.

In *ex parte Foster*, 1810, 17 *Ves.* 414, the Chancellor, upon the application of a person who had been found bankrupt, stayed the advertisement in the Gazette, and superseded before the first meeting.

In *ex parte Harcourt*, 1815, 2 *Rose*, 214, the Chancellor superseded between the adjudication and the first meeting; and in a variety of cases the Court has stayed the advertisement and superseded before the first meeting.

In *ex parte Nicholls*, 1826, 2 *Gl. & J.* 101, on a petition to supersede for want of a sufficient petitioning creditor's

Between first
and second
meeting.

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debt, presented between the first and second meeting, it was objected that the bankrupt had not surrendered. It was answered, that even supposing a surrender to a commission palpably illegal to be necessary, the necessity did not exist in that case. The Vice-Chancellor said, "There is no obligation to surrender till the last meeting. Supersede the commission with costs."

In *ex parte Whittington*, 1818, *Buck*, 235, a person declared bankrupt presented a petition to supersede, and died before the last meeting, without having surrendered. His personal representatives revived the petition, and the commission was ordered to be superseded.

If, therefore, a petition be presented and heard before the forty-second day, the non-surrender by the person declared a bankrupt is no objection to the supersedeas.

Petition pre-
 sented before
 the forty-
 second day
 and heard
 after the forty-
 second day.

In *ex parte Jones*, 1805, 11 *Ves.* 409, a petition was presented before, but, from particular circumstances, was not answered till after the forty-second day. Lord *Eldon* ordered the petition to stand over.

Various other cases were also cited. (a)

(a) The following were the cases cited. They are all to be found at length in the Appendix to *Mont. & Bli.*, page lxi, note X. *Ex parte Williams*, 2 *Ves. & B.* 255; *ex parte Stokes*, 7 *Ves.* 405; *ex parte Lanchester*, 17 *Ves.* 518; *ex parte Fletcher*, 1 *Rose*, 454; *ex parte Bathir*, *Buck.* 426; *ex parte Lowe*, 1 *Gl. & J.* 78; *ex parte Fletcher*, 1 *Ves. & B.* 330; *ex parte Harcourt*, 2 *Rose*, 203; *ex parte Nicholls*, 2 *Gl. & J.* 101; *ex parte Jones*, 2 *Gl. & J.* 101; *ex parte Jones*, 11 *Ves.* 409; *ex parte Whittington*, *Buck*, 233; *ex parte Wilkinson*, 1 *Gl. & J.* 387; *ex parte Drake*, *Mont.* 486, S. C. 1 *Dea. & Ch.* 91; *ex parte Roberts*, 1 *Madd.* 72. S. C. 2 *Rose*, 374; *ex parte Gardner*, *Buck*, 458; *ex parte Wood*, 1 *Atk.* 220; *ex parte Lavender*, 1 *Rosc.* 55; *ex parte Wood*, 1 *Atk.* 221; *ex parte Jones*, 8 *Ves.* 328; *ex parte Bean*, 17 *Ves.* 47; *ex parte Hopkins*, 2 *Rose*, 228; *ex parte Curling*, 2 *Gl. & J.* 35; *ex parte Peaker*, 2 *Gl. & J.* 343; *ex parte Norcott*, *Mont.* 281; *ex parte*

Mr. *Bethell* in reply was stopped by the Court.

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The CHIEF JUDGE: —

It is the unanimous decision of the Court that this petition must be dismissed; but there being some difference of opinion as to the ground of such dismissal, it becomes expedient to pronounce our judgments separately.

Ex parte
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Dec. 13.

This is a petition by the bankrupt, with the concurrence of the assignees and creditors, to supersede, because there is no act of bankruptcy or petitioning creditor's debt. It is such a novelty for assignees to acquiesce in a supersedeas on the ground of the invalidity of the petitioning creditor's debt, when the latter opposes the supersedeas, that we treat this as the petition of the bankrupt.

It has been said that the bankrupt has no knowledge of the issuing and existence of this commission. I think his being a nominal petitioner is almost a sufficient answer. (a) That and other circumstances lead me to say that this is the bankrupt's petition.

The petitioning creditor objects that this petition cannot be entertained, because the bankrupt has not

Glyn, Mont. 128; *ex parte Galpin*, MS. App. *Mont. & Bl.* note X; *ex parte Hooker*, 5th August 1829, MS. Petition by the bankrupt to supersede. He had surrendered at the third meeting, which was adjourned. The bankrupt attended at the time and place fixed for the third meeting, but only two commissioners attended. Ordered to be superseded. *Ex parte Lupton*,

22d March 1823, MS. Petition to supersede by consent. The bankrupt had not surrendered, but was ill. Ordered.

(a) *Order of August 12, 1809.*

All petitions in bankruptcy shall be signed by the petitioners, except in the case of absence from the kingdom, when the petition is to be signed by the person presenting the same on behalf of the person so abroad.

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surrendered, and states such to be the general rule. The other side do not and could not deny that such general rule exists, it having been so often recognized by Lord *Eldon*, Sir *John Leach*, and Sir *Lancelot Shadwell*; but they urge that the rule is not universal, there being cases of exception allowed by each of these Judges, from which may be deduced this secondary rule,—that cases may occur wherein the Court will interfere before surrender. This has been done,

1. Before adjudication ;
2. Before the forty-second day ;
3. After the forty-second day.

1. In particular cases the Court interposes before adjudication ; but such interposition being previous to the insertion of the advertisement in the *Gazette*, requiring the bankrupt to surrender, he has been guilty of no contempt in not having surrendered. (a) In certain

(a) The words of section 25 are, that “ the commissioners shall forthwith cause notice of such adjudication to be given in the *London Gazette*, and shall thereby appoint three public meetings for the bankrupt to surrender and conform, the last of which meetings shall be on the forty-second day hereby limited for such surrender.”

This only enacts that the commissioners shall appoint certain days for the bankrupt to surrender, not that he shall surrender. It is true that in practice they summon him to appear through the medium of this advertisement in the *Gazette*, but it would be no contempt not to ap-

pear thereon, the *Gazette* not being notice unless proved to have been read by the party, or unless the act had made it notice, which it does not in this case. The rule of all courts is, that to bring a person into contempt there must be personal notice. The necessity for surrender is induced by section 112, which enacts, “ that if any bankrupt shall not before three of the clock upon the forty-second day, *after notice thereof in writing left at the usual place of abode of such person*, or personal notice in case such person be then in prison, and notice given in the *London Gazette* of the issuing of the commission, and of the meetings of the com-

cases, where the *ex parte* adjudication might work injustice, the Court would not require a surrender to a legal process, the effect of which it may be deemed expedient to arrest *in limine*.

2d and 3d. Before the forty-second day there may occasionally exist more reasons for a relaxation of the rule than after. It might be harsh to put the bankrupt in peril of a felony, when the commission may after all be superseded. But the only case where the Court have superseded without surrender before the forty-second day, on the ground of the invalidity of the commission, is *ex parte Nicholls*, 2 Gl. & J. 101, a case in which the decision was founded on very particular circumstances. The petitioning creditor's debt was on a bill of costs, which was taxed below 100*l.* before the second meeting, whereupon all proceedings were stopped; no second meeting was ever held, so that no opportunity was afforded for surrendering; and the ground of the Vice-Chancellor's judgment was, that the bankrupt could not be in contempt till after the last meeting, consequently there was no such default on his part,—no withdrawal to such a distance that he could not have heard of any commission which might have issued,—as there is in this case.

It is true that in this case the petition was presented before the forty-second day — one day before only; but the bankrupt, having voluntarily absented himself by proceeding to America, had made his due surrender

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missioners, surrender himself to which was in America. *Quære*,
them," &c. "every such bank- Can it be said, under these cir-
rupt shall be deemed guilty of cumstances, that this bankrupt
felony," &c. No notice was left was either in contempt or liable
at *Kirkman's* place of abode, to prosecution for felony?

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impossible, and it was also impossible that the petition could be heard till after the forty-second day. I am therefore of opinion, that the bankrupt's default in not surrendering prevents his being heard here on a petition to supersede, even if there were no act of bankruptcy, and I have not found any case repugnant to that opinion. All the cases have been cited by Mr. *Montagu*. Of these *ex parte Drake*, *Mont.* 486, and *ex parte Clarke*, *Mont. & Bli.* 379, are directly against this application. *Ex parte Clarke* was, in my opinion, the petition of the bankrupt, though presented in the name of a creditor. In *ex parte Knoulson*, reported in 1 *Mont. & Bli.* 416, as anonymous, this Court also held, that, where a joint commission had been issued, under which some of the bankrupts had surrendered, and others not, it should only be superseded as to those who had surrendered. *Ex parte Galpin*, *Mont. & Bli.* App. note X, and the other cases, furnish support to the general rule; and in *ex parte Carling*, 2 *Gl. & J.* 35, and similar cases, the consent of the creditors operates.

Upon the whole I think it would open the door to great mischiefs to relax the general rule, except under very strong circumstances, which might induce the exception. The circumstances of this case are not such as to bring it within the exception. It is not shown that there was no act of bankruptcy, and it is admitted that the bankrupt was in debt when he left England, perhaps never to return. It cannot be permitted that, while thus withdrawing himself from our jurisdiction, he should be allowed to succeed on a petition presented by an agent here. It appears to me that no trader should be heard in this Court, before surrender, on a petition to supersede, when he has left the country, in debt, and without having made any due provision for payment. In *ex parte*

Foulger (a) I entertained an opinion in favour of the supersedeas; but there had been a verdict against the commission, and no doubt exists in my mind that the bankrupt was not a trader, and, moreover, that the petition was presented by the petitioning creditor himself. In this case I consider the bankrupt to be the petitioner, and he does not deny being a trader. This petition, therefore, must be dismissed on the point of law, and my judgment would have been the same on the merits.

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Sir John Cross:—

It appears to me that there exists a misapprehension as to what is the rule concerning supersedeas before surrender. I have carefully read every case relating to that point, and I find no instance in which a bankrupt has been required to surrender to an invalid commission; I find no rule to prevent the Court hearing this petition on the merits. In *ex parte Peaker*, 2 Gl. & J. 343, Lord Lyndhurst says, "The order made by Lord Eldon in *ex parte Carling* was under very special circumstances. The bankrupt was abroad, and did not mean to return, and it was obviously for the benefit of the creditors that the rule should be relaxed. I do not think that the circumstances of the present case warrant me in making an exception to the rule, that a bankrupt must surrender before he can petition to supersede, even with consent of creditors. This rule has been long acted upon; and though there may in many cases appear no imperative reason for enforcing it, yet the departure from a settled rule is too frequently attended with evil to allow me hastily to deviate from the practice of my predecessors. The question may, for the regulation of such proceed-

(a) Since reported, *ante*, page 457.

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ings in future, be deserving of consideration; but I cannot supersede the present commission until the bankrupt shall have surrendered."

That case distinctly shows, that, in the opinion of Lord *Lyndhurst*, it depended upon circumstances whether the Court would or not hear the petition to supersede without surrender. In that case the supersedeas was refused. It is said that there is a general rule which prevents hearing before surrender. There certainly is such a rule when the validity of the commission is not disputed; but it seems to me repugnant to justice, that, — in a case, which might be put, where a man says, "I am no trader; there is no act of bankruptcy; no petitioning creditor's debt; I am a peer of the realm," — the Court should refuse to hear him till he had surrendered. It would be saying, "All you allege may be true; this commission may be a gross indignity to your character; but you must first surrender before the doors of this Court are open to you." This would be the grossest injustice that man could offer to man. The question, as applicable to this petition, resolves itself into this, — is there a general rule which compels a man on the other side of the Atlantic, who insists that there are none of the requisites to support a commission, to come over here to surrender, in order to enable him to be heard to prove those facts which will instantly render void the proceeding to which he is compelled to surrender? If so, the Governor-General of India, or of Canada, might be made a bankrupt, and the Court might refuse to hear him till he came over here to surrender! The cases have been divided into three classes, which are thus subdivided:

1. Where the validity is admitted:
2. Where disputed.

Ex parte Stokes, 7 Ves. 405, is the leading case where

the validity is disputed. There Lord *Eldon* refused to supersede on the petition of the bankrupt before adjudication, *non constat* that he ever would be declared bankrupt. That case, therefore, was a petition to a court of appeal, presented before the court of original jurisdiction had acted, and Lord *Eldon* held the application to be premature.

Ex parte Stokes, then, is not any authority for the position that we cannot hear this petition. I will not go through all the cases, but the same observation applies to the whole of them. I am clearly of opinion that it is a duty incumbent on this Court to hear the petition of a man who declares that he has not committed any act of bankruptcy, and has not received any summons: and I am further of opinion, that to command him to surrender under such circumstances would be an illegal act; and that the general rule only applies to cases where the commission is admitted to be valid.

There is a circumstance, not yet adverted to, which ought here to have material influence. The legislature has, by the late act, authorized the bankrupt to come here instantly to reverse the adjudication, and has said nothing as to his surrendering in the first instance. This petition might have prayed a reversal of the adjudication; and it may deserve consideration whether we ought not to refuse to hear a petition praying a supersedeas in all cases where the party might pray a reversal. (a)

But this is the case of a petitioner who has never been in contempt, for no summons was ever left at his place of abode, and he disputes the validity of the com-

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(a) But see *ex parte Palmer*, 1 *Dea. & Ch.* 341.

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mission ; therefore, even if there exist a general rule as stated, there never was a stronger case for exception ; and, accordingly, in this case the rule has given way, and the petition has been heard on the merits, and on those alone my judgment is founded.

If I had looked only at the deposition on the proceedings, I should not have arrived at the conclusion that an act of bankruptcy had been committed. I do not deny that others may come to that conclusion, but I should not. There is, however, pregnant evidence, on the face of the petition itself, of an intent to delay creditors, not by going abroad, but by remaining out of this realm with intent to delay creditors.

Under these circumstances, I am of opinion that the bankrupt remains abroad for the purpose of delaying his creditors, and that his petition must be dismissed.

Sir George Rose : —

One of my learned colleagues has stated, that in this case the rule has given way, and that the petition has been heard on the merits. Mr. *Bethell* urged the non-surrender as a sort of demurrer or plea, which, if over-ruled, would have let in the hearing on the merits ; but I do not understand that the objection was over-ruled, or that the rule gave way.

If any one rule of practice was formerly better settled than another, it was this, — that non-surrender was conclusive against hearing a petition to supersede, not only where the bankrupt, but also where the creditors petitioned, the grounds being the contempt and felony. This was no loose rule, but was considered, when I left the bar, as so settled, that no gentleman at the bar would have thought it right to dispute the point. Afterwards this Court was established, and perhaps it was

fair that the bar should indulge in a little speculation as to what course of practice we should pursue. In order to prevent such doubts, we informed the profession, by one of our first general orders, that we should adhere to the old rules of practice. This point was nevertheless started in *ex parte Drake, Mont. & B.* 386, S. C. 2 *Dea. & Ch.* 91, where the Court refused to supersede before surrender, though the adjudication had been reversed, which was the strongest possible case.

In the report of *ex parte Drake*, in *Deacon & Chitty*, is the following note: — “ It certainly seems an absurd rule of practice, where the bankrupt *bond fide* contests the validity of the fiat, on the ground of the insufficiency of the trading, the act of bankruptcy, or the petitioning creditor’s debt, that he cannot apply for a supersedeas without a previous surrender, and being compelled in a certain degree to submit to the very authority which he insists is invalid. Sir *William Evans*, in his sensible letter to Sir *Samuel Romilly* on the revision of the bankrupt laws, recommends a middle course of proceeding on this subject, namely, to give the party an opportunity of submitting the question in each particular case to the consideration of the Court upon a particular motion, and that the surrender should be dispensed with whenever the opposition to the commission appears to arise from a fair and real objection to its validity, and not from any vexatious or improper motive.” — *Letter to Romilly*, s. 26.

This contains in a few words all that can be said as to the propriety of the rule.

But there really can be no doubt as to the existence of the general rule, or, in my opinion, its expediency.

A trader may withdraw his person and property out of the jurisdiction, and there is no remedy against him but proceeding to outlawry, or taking out a fiat in bank-

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ruptcy. If a fiat be taken out, the supersedeas thereof is discretionary, and this Court will not, as a general rule, supersede before the bankrupt has surrendered. It has been asked, is a man to go before the commissioners, and have all his private affairs made public, when he can instantly prove the fiat invalid? I am of opinion that no such consequence need follow; when such a case occurs let the bankrupt apply to this Court to restrain the commissioners from so examining him, and if this Court perceived that he intended *bonâ fide* to pursue the supersedeas, the probability is that the commissioner would be so far restrained. (a) There may be many inconveniences in the rule, but we are dealing with a balance of inconveniences, and it is enormously in favour of the rule.

I cannot agree as to its supposed inexpediency. Looking at all the circumstances of mischief which might arise if a bankrupt could avoid surrender, and considering that his surrender does not deprive him of a single legal or equitable remedy consequent to the supersedeas, I think the Court ought, in general, to adhere to the rule, not to supersede before surrender. If indeed his surrender decided the question as to the fact of bankruptcy, precluded bringing actions, or in any the slightest circumstance qualified the legal or equitable rights of the bankrupt, I should say that the rule should at once be abandoned; but such, I repeat, is not the fact. If, then, this commission be worth any thing to any of the creditors, ought we not to protect them? This peti-

(a) Though the Court can interfere if commissioners exceed their authority, yet it will not be assumed that they are about to do so. Thus, where a mortgagee, summoned to attend the commis-

sioners, petitioned that they might be restrained from requiring the production of the mortgage deed, the petition was dismissed with costs, as premature. *Ex parte Besson, Mont. & Mac. 244.*

tioner goes to America (leaving, as he admits, debts unprovided for); a commission issues, which he applies to supersede, still keeping his creditors at arm's length. If he thinks it of importance to supersede, let him first put himself in a fair position as to these creditors, by bringing himself within their reach, and then, if he establishes a right, we will supersede.

The very terms of the statement, that there is a general rule, imply that there may be exceptions, as where creditors apply, or there has been a verdict against the commission. But I think that even such verdict, on an action by a creditor, would not be sufficient, unless it appeared that the interests of all the creditors were well represented and defended; that is, unless the petitioning creditor, who represents them all, was party to the action: otherwise some one creditor might be used as the tool of the bankrupt.

Having looked over the proceedings, I must say I never saw an act of bankruptcy more properly found; of that indeed I was convinced on looking at the petition itself.

I cannot but regret that it ever became necessary for the Court to deliver a deliberate judgment on the point that the objection taken was valid.

Petition dismissed with costs.(a)

(a) Reference having been made on former occasions to *ex parte Glynn, Mont.* 124, and that case having been stated to have been reported too briefly, an attempt has been made to amend this by searching the registrar's book.

The following is the registrar's note of the case in the minute book.

" *Ex parte Glynn re Bacon.*

" To supersede on consent of creditors.

" Mr. Wakefield applies for superseas, and states no surrender.

" (But qu. as to surrender, as third meeting had passed.)

" V.C.—Take order for superseas. I think, as the creditors

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apply and consent, it may do without surrender."

On a reference to the order book, No. 187, page 291, it appears that it was the petition of Sir R. C. Glynn, bart., Thos. Ha-
lifax, Richard Plumtree Glynn, Charles Mills, and George Carr Glynn, bankers and co-partners, Charles Williams and Philip James Breach, partners, and Edward Wheeler, esq. That Sir R. C. Glynn and Co. were the peti-

tioning creditors. That the only creditors who had proved were,

Sir R. C. Glynn and Co. 1569*l*.

C. Williams and P. J. Breach, 246*l*.

That W. Mills was chosen sole assignee, and that the bankrupt, by the assistance of his friends since the third meeting, had compounded his debts, whereon the petitioners agreed to super-
 sede.

APPENDIX.

Ex parte Sir C. MARSHALL and another, Sheriffs of Middlesex. — In the matter of FOX (*a*).

REPORTED, *ante*, page 118—145.

THE question in this case was, whether the Sheriff of Middlesex, being obligee in a bond executed by the bankrupt Fox, conditioned to indemnify the sheriff against all loss which he might sustain in consequence of his making, at the request of Fox, a return of *nulla bona* to a *fi. fa.* issued by one Mahoney, and having been damnified to the extent of £ by an actual payment of that sum to Mahoney after the date of the fiat, but before the proof was tendered, could be admitted to prove for that sum against Fox;—or, to state it more generally, whether, upon a contract whereby the contractor binds himself to pay money to the contractee in a certain event, but the terms of the contract are such that

(a) The manuscript of the following observations was lent by Mr. Commissioner Fane to Mr. Montagu, at his request, and the observations are now printed, in consequence of an application by Mr. Montagu to Mr. Fane, to which Mr. Fane sent the following reply:—

“ Dear Sir,

“ You are aware that the observations I lent you were put together for a private purpose, and without any view to publica-

tion, and I have some little difficulty about acceding to your request, but if, upon reflection, you think that the publication of the observations would tend to elucidate a subject which is certainly at present somewhat obscure, I cannot refuse to contribute my mite towards the diffusion of correct information.

“ Yours faithfully,

“ C. FANE.”

“ Linc. Inn.”

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at the date of the fiat it remains still uncertain whether any thing will ever be payable, and, if any thing, how much, proof can be admitted if the uncertainties which existed at the date of the fiat are reduced to certainties before the proof is tendered.

It appears to me that such proof is admissible, whether the question be considered with reference to the general principles of justice, the spirit of the bankrupt law as evidenced by its successive enactments, the letter of the enactment in question, or to authority. (a)

And first, With reference to the general principles of justice.

It is plain that every system of bankrupt law ought to provide for three things; seizure of the bankrupt's property; satisfaction of his contracts; and restitution of the bankrupt to the pursuits of industry, released from all his contracts, or all with few exceptions. The law of England does not indeed attempt this; it provides for the seizure of *all* his property, and for the satisfaction of *certain* of his contracts; and it also releases the bankrupt from all those contracts for the satisfaction of which it has provided; but, with few exceptions, it goes no farther. The contracts it provides for are those which constitute actual debts, or are of the nature of debts; but even as to these, its provision was, till lately, somewhat limited, and it will be presently seen that that limitation had reference to *time*. Now the right of seizure goes down to the latest moment; the law seizes not only what the bankrupt had when he became bankrupt, but also all he acquires up to the date of the certificate. Does not justice require that the relief should be coextensive with the seizure; that if the seizure descends to the latest moment, the relief should be equally extensive; and that therefore all contracts to pay money, which ripen into actual debts *before the distribution of the funds seized*, should be included in the relief?

Secondly, As to the spirit of the bankrupt law and its successive enactments.

Originally it was provided that all the bankrupt's property

(a) See *ex parte Lewis*; *ex parte Myers*, cited *infra*.

should be seized and sold, and applied in payment of his *debts*. Strictly speaking, the word "debt" means a legal obligation to pay a certain sum of money to a creditor *at a time then past*, and hence originally (a) only those were admitted to prove who were actual creditors on the day of the act of bankruptcy committed; in other words, only those to whom a certain sum was *payable on the day of the date of the act of bankruptcy*. The hardship of this was excessive; many creditors were excluded; and of course the bankrupt, after giving up every thing, and obtaining his certificate, remained liable to their demands. From time to time the legislature interposed to remedy such glaring cases of injustice as forced themselves upon its attention. By the 7 Geo. 1. one class of creditors was admitted, viz. those whose contracts were in existence before the bankruptcy, and in writing, but whose day of payment was *after the date of the commission*. By the 19th of Geo. 2. c. 32. s. 2. another class was admitted, viz. the obligees in bottomry and respondentia bonds, and the insured on marine insurances, where the loss or contingency had not happened until *after* the date of the commission. By the 49th of Geo. 3. c. 121. ss. 8. 9. and 17. three new classes were admitted; 1st, Sureties for bankrupts' debts, who under a contract of suretyship prior to the bankruptcy had paid the creditor *after* the date of the commission; 2dly, Creditors whose contract was for payment on a day *after* the date of the commission, but whose contract *was not in writing* (those whose contracts *were in writing* had been provided for by the 7 Geo. 1.); and, 3dly, Annuity creditors.

It is plain that the object of this course of legislation has been to extend the sphere of relief; on the one hand, to relieve a greater number of creditors, and, on the other, to give a more extended release to the bankrupt. It is equally plain that the principal means adopted have been the carrying down of a *date*. At first the essential date was the earliest act of bankruptcy, but by degrees that was carried

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(a) *Callowell v. Clutterbuck*, 2 *Strange*, 867.

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down to the date of the commission. If this legislation were to be continued in the same spirit, would it not be reasonable to expect that the same means would be adopted, viz. the shifting of a date, the carrying it down to the period of distribution?

Thirdly, With reference to the enactment in question.

Notwithstanding the legislature had by these successive enactments greatly extended the sphere of relief, it still left the bankrupt liable to large classes of contracts which were in common parlance, though very inaccurately, called contingent debts.

If, for instance, *A.* had contracted to pay *B.* 1,000*l.* if a particular ship arrived safe in port, and before the arrival *A.* became bankrupt, *B.* could not prove, because this was what was called a *contingent debt*.

Again, if *A.* had contracted to pay a sum of money to *B.* on *C.*'s death, or within a month of *C.*'s death, or at any other uncertain period, and *A.* became bankrupt, *B.* could not prove, for this also was called a contingent debt.

Again, if *A.* had contracted, upon borrowing some stock of *B.*, to replace it, and no particular period was specified, and before *B.* made any demand to have the stock replaced *A.* became bankrupt, *B.* could not prove; for this also was called a contingent debt.

Again, if *A.* had contracted to guarantee to *B.* the payment of a debt to him by *Z.*, and before *Z.*'s debt became payable *A.* became bankrupt, *B.* could not prove, for this also was called a contingent debt.

And yet in all the above cases, if the event upon which the conversion of the so called contingent debt into an absolute debt was to take place did but happen one day before the bankruptcy, the contractor would, without any *new* contract or judgment of a court, be entitled to his proof, and the bankrupt would by his certificate be discharged from the demand.

These miserable distinctions, founded on mere technicalities, establishing that if an event happened to-day proof should be admitted, but that if it happen to-morrow, or the day after, the proof should be rejected, although the proof

tendered was in both cases *founded on the same contract*, and although at the moment of the event happening the fund with respect to which the proof was to operate remained not only undivided but absolutely uncollected, offended every man's moral sense; and at last, after repeated declarations from the Bench that a remedy ought to be provided, an attempt was made to extend the remedial effect of the bankrupt laws, and the 56th section was inserted in the Bankrupt Act of 1825. The language is as follows: "That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable on a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt; and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

That section seems intended to provide for *all* cases of contingent debts, and for that purpose divides them into two classes; 1st, Those where the contingency *has not* happened when the proof is tendered; and, 2d, Those where the contingency *has* happened before the proof is tendered. For the first class it provides by saying that the contingency shall be valued, and for the second by saying that proof shall be admitted for the whole sum. To me that section seems to speak thus: "Formerly, in these cases of contingent debts, proof was admissible if the combination of events necessary to create the right of proof did but occur before the date of the commission. There is no reason why in these cases the date of the commission should be taken as the essential date; if there be a date more reasonable than another, it is the

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date of the distribution of the funds on which the proof is to operate ; henceforth, therefore, let there be proof in all cases where the combination of circumstances, the occurrence of which, *before the date of the commission*, would, under the old system, have created the right of proof, occurs *before the proof is tendered*." If this be a correct view, it follows that in *ex parte Marshall* the proof ought to have been admitted ; for it is clear, that if the sheriff had paid *Mahoney* one day before the date of the fiat, he might then have proved.

Whether, then, we look to the principles of justice, the course of legislation on the subject, or the letter of the enactment in question, the conclusion is the same, viz. that the proof ought to have been admitted. The learned Judges and Commissioners held otherwise. It remains to consider the arguments and cases by which they supported their conclusion.

The first argument was, that to a proof under section 56 it was essential there should be *a debt actually existing at the time of the bankruptcy*. Thus, Mr. Commissioner *Merivale* says (p. 122), "In order to establish a proof under this 56th section there must be *a debt* contracted and *actually existing* at the time of the bankruptcy." Mr. Commissioner *Fonblanque* speaks of the "numerous cases which support the doctrine that there must be *a debt* existing and ascertained at the date of the commission," citing, amongst other cases, that of the *Lancaster Canal Company, Mont. & Bli. 94*, in which Lord *Brougham*, in his judgment, adopts a similar doctrine. His words are — "I also think that this cannot be considered a contingent debt within the meaning of the 6 Geo. 4. c. 16. s. 56. *because there was no existing debt* ; and it has been already determined by the Court of King's Bench that there must be an *actual debt* dependent on a contingency to give a right of proof under the claim in question." It does not appear that Mr. Commissioner *Holroyd* made use of the words "there must be a *debt* actually existing, &c." but he certainly uses equivalent expressions ; and the whole of his argument turns on the strict meaning of the word "*debt*."

The Chief Judge of the Court of Review says (p. 152), "In order to enable a contingent debt to be proved, it must be such a contingent liability as can be considered a *debt* existing when the commission issues. And afterwards he says (p. 157), "The broad question is, Had the bankrupt contracted any *debt* before the issuing of the fiat?" Sir *John Cross* and Sir *George Rose* concur; and Sir *George Rose* adds (p. 160), "The first question must be, whether any *debt* exists." I presume his Honor meant at the date of the fiat; for it is quite certain that a debt existed in the case under discussion, at the moment when he was speaking.

This argument, then, is founded on the strict meaning of the word "debt" as used in the 56th section; but is it possible to attach the strict meaning to the word as used there? The words used in section 56 are — "Debts payable on a contingency." Are not these words contradictory? Can such a thing as a contingent debt exist? Does not the idea of debt exclude the idea of contingency? Does not the idea of contingency exclude the idea of a debt? If I promise to pay *A.* 1,000*l.* when my ship arrives in port, this in popular language is called a contingent debt; but in fact it is no debt at all; I owe nothing to *A.*, and perhaps never shall. If my ship go to the bottom I owe nothing, but if my ship arrive I instantly owe him 1,000*l.* When, then, am I his debtor, and he my creditor? or, in other words, when does a *debt* first exist? Surely when the contingency has ceased. How, then, in *strictness*, can such a thing as a contingent debt exist, when till the contingency ceases there is no debt; and when there is a debt the contingency must have ceased.

It being then plain that the words used, viz. "debts payable on a contingency," cannot, in strictness, have any proper meaning, the next question is, what must have been the sense in which the legislature used them? and it is plain it was the popular sense. The expression, however incorrect, is perfectly familiar in legal discussions, and till 1825 was applied with unvarying uniformity to every case where there was an *original contract to pay money to an alleged creditor*

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in case or when a particular event occurred. If *A.* contracted to pay money to *B.* on demand or request, or on a month's notice, this was called a *contingent debt*; *ex parte Alcock*, 1 *Ves. & B.* 176. Why? Because at the bankruptcy it was contingent, whether any demand or request would be made, or whether a month's notice would be given. If *A.* contracted to pay *B.* what *C.* owed if *C.* did not pay, this also was called a *contingent debt*, because perhaps *C.* might pay the whole, or a part; so that in such case there was a double contingency; 1st, Whether *any thing* would become payable to *B.*; and if any thing, 2dly, How much? Thus, in *ex parte Minet*, 14 *Ves.* 189, where the bankrupt and another signed a paper to this effect, "We promise to guarantee to *G.* and Co. the repayment, on one month's notice in writing, of all sums of money they may lend to *W. & Co.*, with interest, not exceeding 1,000*l.*," and no notice had been given before the bankruptcy, Lord *Eldon* calls the contract a *contingent debt*.

In the 19th Geo. 2. c. 32. s. 2. an obligation on a bottomry or respondentia bond, or on a policy of assurance, is called a *debt* before the contingency has happened; and in the 7th Geo. 1. c. 31. sections 1 & 2. an obligation to pay money on a future day is called occasionally a *debt*. Indeed, the person who penned that statute seems to have felt the incorrectness of the expression, and to have avoided it as long as he could, substituting such words as "securities," "promises," "agreements," "duties," &c.; but the word *debt* slips out in two instances: instances of this sort of incorrectness might be multiplied *ad infinitum*.

But, notwithstanding this incorrectness, it will be found, on examination of the cases where the expression is used, that it is never used except in reference to a contract by a debtor to pay money to a creditor. The expression, "contingent debt," was never yet applied to a contract to marry, or to a contract to build, or to a contract to cultivate lands in a particular way, or, indeed, to any contract other than a contract to pay money. Contracts to marry, and the like, are obligations, but not obligations of the nature of debt.

Such contracts may, indeed, end in debts, but not without action brought and judgment obtained, and even then the debt originates with the judgment of the Court. The expression, then, is never used except in reference to a contract *to pay money*; but neither is it applied or applicable to all contracts to pay money; it is only applied to contracts *by the contractor to pay money to the contractee*. A contract by the contractor that *a third person* shall pay the money is not a contract of debt. In *Attwood v. Partridge*, stated below (a), *Partridge's* contract was, that a third person, one *Robinson*, should pay some money periodically to an insurance office: such a contract can never create a *debt* of any sort, actual or contingent. In an action founded on a contract of debt the plaintiff seeks to recover the amount contracted to be paid, with interest and costs; but in *Attwood v. Partridge* the plaintiff sought to recover, not the trifling sums which *Partridge* had contracted that *Robinson* should pay, but an amount of damage to himself, arising from *Robinson's* default, infinitely greater than those trifling amounts. So a contract by the contractor that he will pay a sum of money, not to the contractee, but *to a third person*, is not a contract of debt. Suppose that in *Attwood v. Partridge* the contract had been, not that *Robinson* should pay the sums to the insurance office, but that he, *Partridge*, would, still there would have been no contract of debt. *Attwood* would not have sought to recover the trifling amounts contracted to be paid, but the amount of the damage accruing to him from *Partridge's* default, which might have been thousands of pounds.

To constitute, then, a contract of debt three things are essential:

1. That the contract be *to pay money*;
2. That it be that the contractor, *and not somebody else*, shall pay; and
3. That it be to pay *to the contractee*, and not to any third person.

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The conclusion, then, is :

1. That the word *debt*, as used in the 56th section, cannot mean "debt" in its strict sense ; for if so, the section would be mere contradiction and nonsense.
2. That the word must be understood in its popular sense.
3. That every contract by the alleged debtor to pay money to the alleged creditor, is, in a popular sense, a debt absolute or contingent ; and
4. That as the contract here was a contract by *Fox* to pay to the sheriff what the latter should lawfully pay to *Mahoney*, there was a debt payable on a contingency within the meaning of the 56th section.

Upon the whole, therefore, it appears to me, that the first argument, namely, that to a proof under the 56th section it was essential there should be *a debt* actually existing at the time of the bankruptcy, is not tenable.

The second argument appears to have been substantially the same, or, at all events, not very distinguishable from the first, viz. that the right of the sheriff was a right to what is commonly called "unliquidated damages." A distinction was taken, or rather attempted, between what is "*technically debt*," and what "sounds in damages;" and again, between "contingent liabilities that may never become debts," and "contingent debts that may never become payable." It is obvious that no expressions can well be more indistinct, or less calculated to convey clear ideas, than the above. To me it appears that the only useful distinction which can be taken, with reference to this argument, is between those cases where the damages are measured by and are co-extensive with an original contract to pay money, and those where they are not so measured. To argue against a right of proof, that the right is to damages, is very unsatisfactory. Every right resisted results, at law, in a right to damages. If *A.* give *B.* a promissory note for 100*l.* and interest, and does not pay it, *B.*'s right is to damages. *B.* must end his declaration with the common form, "to the *damage*, &c." The common law never professes to compel the *specific per-*

formance of a contract; that is a jurisdiction exercised only in Chancery. That a party has a mere right to damages is, therefore, inconclusive. The argument should go further; it should be, "Your right is a right to damages which are in this sense unliquidated, that they are either entirely discretionary, — as in the case of damages for a breach of promise of marriage, or for an assault, — or if not entirely discretionary, but capable of accurate measurement, are yet to be measured, not by the amount of a sum contracted to be paid, but by another and totally different measure, as in the case (a) of damages for nonperformance of a contract to accept so many tons of linseed oil, and pay for them at a certain price on a certain day." If this be the true argument, it does not operate against the right of proof here, for the damages to which the sheriff was entitled were the exact amount of what he had been compelled to pay to *Mahoney*, and *Fox's* contract was in substance a contract to pay him that very sum.

In support of the above arguments, the following cases at law were cited: *Birè v. Moreau*, 4 *Bing.* 57; *Attwood v. Partridge*, 4 *Bing.* 209; *Boorman v. Nash*, 9 *Barn. & Cres.* 145, and *Yallop v. Ebers*, 1 *Barn. & Adol.* 698; but none of them support the arguments in question.

Birè v. Moreau, 4 *Bing.* 57, 1827.

In an action by *Birè* against *Moreau*, the latter obtained a verdict, and was of course entitled to his costs. After the verdict, and before the costs were taxed, *Birè* became bankrupt; afterwards *Moreau* taxed his costs, and issued execution against the bankrupt. The question was, whether these costs were proveable under the 56th section. It was held they were not.

It is clear that that case cannot touch the present question. Here there was an original contract to pay money. In *Birè v. Moreau* there was no original contract to pay money. The right to the money was founded, not on a *contract* to pay, but on the judgment of the Court, and it was on that circumstance the judges rested their judgment.

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(a) See *Boorman v. Nash*, 9 *Barn. & Cres.* 145.

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Attwood v. Partridge, 4 Bing. 209, 1827.

The plaintiff was interested to have a policy of assurance on the life of *A.* kept up. *A.* had contracted to pay the premiums in the usual way, and the defendant had covenanted with the plaintiff that *A.* should pay the premiums. *A.* having omitted to pay, the plaintiff proceeded against the defendant to recover damages for breach of his covenant. The defendant, having become bankrupt since his covenant, pleaded his bankruptcy and certificate. The question was, whether the plaintiff could have proved his then demand, and it was contended that he could under the 56th section. It was held that he could not.

Now what was the bankrupt's covenant? Was it a contract that *he* would pay money to the alleged creditor *Attwood*, which alone can constitute a debt? (a) No: it was a contract which wanted no less than two out of the three ingredients necessary to constitute a contract of debt, for although it was to pay money, the payment was not to be made by the alleged debtor, or to the alleged creditor. The payment, according to the bankrupt's contract, was to be made by a third person, one *Robinson*, and to a third party, the insurance office. To argue for a moment that this was a contract of debt, was absurd. That case, therefore, cannot touch the question here.

Boorman v. Nash, 9 Barn. & Cres. 145, 1829.

Boorman had agreed to sell *Nash* twenty-five tons of linseed oil on certain terms, and *Nash* had agreed to pay for them. Before the period of delivery and payment arrived, *Nash* had become bankrupt, and of course did not complete his contract. Linseed oil having fallen in price, *Boorman* lost on the re-sale, and in consequence brought this action against *Nash* for the loss. *Nash* pleaded his bankruptcy, &c. The question was, whether the plaintiff could have proved his then demand against the bankrupt under the 56th section? and it was held that he could not.

(a) See page 739, *supra*.

Undoubtedly this case appears, at first sight, the most difficult to deal with of all the cases *at law*, for the bankrupt was to pay the money to the alleged creditor; but the explanation is, that the plaintiff's action was brought, not for the sum which the bankrupt defendant *Nash* had contracted to pay him, with interest, &c., but for the difference between the price which *Nash* had agreed to pay and that which *Boorman* got upon the re-sale, with warehouse rent, &c.

It would lead me too far from my present object to discuss the class of cases which relate to the question, what are the rights of a vendor where the subject of a sale is not any thing specific, but merely a quantity of an article, and the contract is not strictly performed. *Possibly Boorman* might have been at liberty to have tendered to *Nash* or his assignees twenty-five tons of oil on the proper day, and might, on non-acceptance, have treated the oil so tendered as the property of the assignees, and *Nash's* estate as his debtor for the agreed price, and then insisting on some right of retainer of the oil in the nature of stoppage in transitu, and having procured the same to be sold under the usual mortgagee's order, have come in and proved for the difference, and in that way, *perhaps*, he might, under the 56th section, have had a proveable debt; but whether he might have done so or not, he was at all events not compellable to adopt that course. He had an election, and he elected to treat the contract as abandoned, and, instead of suing for the price, to sue for damages in respect of his loss; in other words, to sue for the difference between the price agreed for and the price obtained, &c.; and it was upon his rights, when he adopted this latter course, that the judges declared their opinion. It thus becomes obvious that *Boorman v. Nash* does not touch the present question.

Yallop v. Ebers, 1 Barn. & Adol. 698, 1831.

Yallop was acceptor of a bill which was in the hands of a third person. *Ebers* contracted with *Yallop* that he (*Ebers*) would take it up, but did not; afterwards *Ebers* contracted with *Yallop* either to deliver up to him his acceptance within a month, or give him a bond of indemnity. *Ebers* did not perform this latter contract. *Yallop* was sued on his ac-

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ceptance, and compelled to pay; but before he had paid, *Ebers* became bankrupt, and obtained his certificate. *Yallop* then sued *Ebers*, who pleaded his certificate. The question was, whether *Yallop's* demand was proveable against *Ebers* under the 56th section? It was held that it was not.

In that case *Ebers's* first contract was certainly to pay money, but to whom? To the alleged creditor *Yallop*? No; but to a third person, the holder of *Yallop's* acceptance. Such a contract, as above observed (a), is not a contract of debt; as to *Ebers's* second contract, that was not even a contract to pay money.

Besides the above cases there is one decided in bankruptcy, cited in support of the judgment, *ex parte The Lancaster Canal Company*, *Mont. & Bli.* 94. In that case *Dilworth*, *Arlington*, and *Birkett*, upon being appointed treasurers to the Company, executed a joint and several bond, conditioned amongst other things for payment, *when thereunto required*, of the balance in their hands. They became bankrupt before any formal request had been made for the balance. A proof had been admitted against their joint estate, but it was insisted for the Company that they were entitled to withdraw that proof, and prove against the separate estate on the separate obligation in the bond. It was held by Lord *Brougham* that their right against the separate estates depended on the bond; that the bond had not been forfeited for want of a request, and that the Company had no right of proof under the 56th section. His Lordship's words are stated above, page 736.

His Lordship does not mention the decision in the King's Bench, to which he alludes, and I am not aware of any decision to that effect. To say that there can be no proof under the 56th section where there is no "existing debt," no "actual debt," at the bankruptcy, as above observed (b), is to supersede the section altogether, for in no case where there is a contingency as to the payment can there possibly be *an existing debt*, — *an actual debt*. Surely the case of the Lancaster Canal Company, if any, was a case within the act. Surely that contract was a contract of debt; for it was a contract to

(a) See page 739.

(b) Page 737.

pay money, viz. the balance due; the payment was to be made by the alleged debtors, the bankrupts, and to the alleged creditor, the Company. The only circumstance which suspended the absoluteness of the obligation was the contingency, that perhaps no demand might ever be made. The act provides, that if that contingency happens *before the proof is tendered*, that is enough. It is difficult to conceive a case which, in point of reason, is more worthy of the protection of the act; for what can it matter, in point of reason, whether the formal demand, in such a case, be made the day before or the day after the date of the fiat? and it is not pretended but that the right of proof would have been clear if the demand had been made *before the date of the fiat*.

In opposition to the decision in *ex parte Marshall* are the following authorities:

Ex parte Lewis, Mont. & Mac. 426, 1830. *Collier* contracted to pay *Cauty* 2,000*l.* on the 29th of June 1826, and, by way of collateral security to *Cauty*, *Charman* executed a bond that if *Collier* made default in paying, he, *Charman*, would pay a week after. Some time before the 29th, *Charman* became bankrupt; afterwards *Collier* made default, and *Cauty* tendered his proof under *Charman's* commission. The commissioners rejected the proof; but on appeal to the Vice-Chancellor, he admitted the proof.

In that case there was a contract to pay; the payment was to be made *by* the alleged debtor, and *to* the alleged creditor; but *at the bankruptcy* the contingency was extreme. Perhaps *Charman* might never have been liable for a farthing; for perhaps *Collier* might have performed his contract. It was equally uncertain how much *Charman* might become liable to pay, for he was only to pay what *Collier* did not, and *Collier* might have paid much or little. Here, then, there was, first, a contingency as to whether any thing was payable or not, and if any thing were payable, then, secondly, a contingency as to the quantum. Still the proof was admitted.

Ex parte Myers, Mont. & Bli. 229, 1833. The bankrupt *Sudell* had signed a paper dated in 1823, and addressed to Messrs. *Myers* and Co., whereby, in consideration of

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Messrs. *Myers* accepting some bills to be drawn by third persons, and accepted for the accommodation of those persons, the bankrupt agreed in substance, that if those persons did not provide for the bills so accepted in a certain specified way, and, in consequence, Messrs. *Myers* were damnified by being made responsible to the holders, the bankrupt would indemnify Messrs. *Myers*. The bankrupt's responsibility was limited to 12,000*l*.

Sudell became bankrupt. After his bankruptcy *Myers* and Co. were damnified by being compelled to pay bills which were running at the time of the bankruptcy. Messrs. *Myers* claimed to prove against *Sudell* to the extent in which they had been thus damnified. The commissioner rejected the proof. The Court of Review, on appeal, admitted it.

Here, then, was a contract to pay money; the payment was to be made *by* the alleged debtor, *Sudell*, and *to* the alleged creditor Messrs. *Myers*; but here also the contingency was extreme. At the bankruptcy it was perfectly uncertain whether Messrs. *Myers* would be called upon for a farthing. The third persons might take up the bills, or furnish the necessary funds. It was equally uncertain how much they might be damnified. The third persons might pay all or any part, and it was for the difference only that Messrs. *Myers* would be damnified.

The contract in *ex parte Myers*, divested of technicalities, was this: "I contract with you to pay to you what you may be compelled to pay to the holders of the bills you accept."

The contract in *ex parte Marshall* was, "I contract with you to pay to you what you may be compelled to pay to one *Mahoney*."

What difference is there? To say of either of those contracts, with the view of distinguishing it from the other, "this is a mere guarantee," or "a mere indemnity contract," or "a mere liability," or "a mere claim for unliquidated damages," or "merely a collateral security," or "this contract sounds in damages," or to attempt a distinction (see *ex parte Marshall, ante*, p. 156,) between "contingent liabilities that may never become debts, and contingent debts that may never become payable," is to confuse, not to elucidate. It would

be difficult to determine to which of the above contracts these expressions would be most suitable.

Upon the whole, therefore, it appears to me that wherever there be in existence at the bankruptcy a contract by the bankrupt to pay money to the alleged creditor, but the payment is contingent in respect either that it is altogether uncertain whether any payment will ever be due, or that the day of payment is uncertain, or that the amount to be paid is uncertain, still, if events happen which remove those contingencies before a proof is tendered, the proof ought to be admitted.

If it be said that uncertainty of payment is a fatal objection, the answer is, that in *ex parte Lewis* (a), *ex parte Myers* (b), *ex parte Tindall* (c), and *ex parte Grundy* (d), it was uncertain at the bankruptcy whether any payment would ever be due.

If it be said that uncertainty as to the period of payment is a fatal objection, if that uncertainty be produced, as in *ex parte Lancaster Canal Company*, Mont. & Bli. 94., by the necessity for a previous notice, the answer is, why should uncertainty so produced be more fatal than uncertainty produced by the time of payment being dependent on a death. If a contract by the bankrupt to pay *B.* on a death be proveable, why should a contract by the bankrupt to pay *B.* on demand, or when requested, or within a month after demand or request, not be proveable? The period of a demand or request is not more uncertain than the time of a death.

If it be said that uncertainty as to the amount to be paid is a fatal objection, the answer is, the amount was uncertain in *ex parte Lewis* and *ex parte Myers*.

The only remaining argument against the proof is, that if proofs be admissible in such cases, *claims* must also be entered; that those claims might be of uncertain amount, and thus prevent that which is the main object of the bankruptcy law, namely, the *early* distribution of the funds.

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(a) *Mont. & Mac.* 426.(c) *Mont.* 375.(b) *Mont. & Bli.* 229.(d) *Mont. & Mac.* 295.

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I do not see the force of this argument. By the Bankrupt Act there can be no dividend earlier than four months after the date of the fiat. There would be nothing unreasonable in saying to the claimant, "claims are intended to protect the interests of those who have a *present* right of proof, but are not at the moment prepared to substantiate their proof. The division of the fund is suspended by law four months at least. You must take your chance of being prepared to prove within the four months, or such further time as accident may give you." In nine cases out of ten, perhaps in ninety-nine out of a hundred, the time which accident would give would be ample, and perhaps in a special case it might not be an unwise exercise of discretion to admit a claim. If it be said that injustice might occasionally result, the answer is that injustice frequently results from the present system. All that is proposed is, that the right should be tried with reference to a different date, the date of the distribution of the assets, not that of the fiat. In such cases something must be left to chance. The principle of doing so has been adopted in all those cases where, under a gift in a will to a class, those only of the class are admitted to participate who *happen* to be in esse when the period of distribution arrives. A child is born to-day, he is admitted; had he not been born till to-morrow he would have been excluded. A line must be drawn, the best that can be devised. If hardship ensue, the sufferer must submit.

It has sometimes been said, that the 56th section was intended to provide, not for two classes of cases, but for one only, namely, that in which the contingency was from the first capable of valuation. The language of the clause does not seem to require such a construction, and such a construction would narrow in a very mischievous degree the remedial effect of the clause. It was so argued in *ex parte Myers*; but *Erskine*, C. J., declared, p. 237, that that did not appear to him "to be the sound construction." That case is a direct authority against the notion.

Upon the whole it is submitted, that the proof in *ex parte Marshall* ought to have been admitted.

GENERAL ORDER,

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SPECIAL CASE.

It is ordered, That every special case of appeal from the Court, tendered for the approval of one of the judges, shall be left for that purpose at the office of the registrar, signed by the counsel for the respective parties, or accompanied with a certificate from the counsel for the appellant that there is, in their judgment, good cause for such appeal, and an affidavit that a copy of such case has been delivered to the solicitor for the other party eight days prior to such tender thereof.

THOMAS ERSKINE, C. J.

J. CROSS, J.

G. ROSE, J.

DIGEST
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CASES REPORTED IN THIS VOLUME,
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CONTEMPORARY CASES
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ACCOUNTS OF ASSIGNEES.

Assignees may be ordered to furnish a creditor who has proved with a copy of their accounts, if he offer to pay the expence of such copy; but, per Chief Judge, "it is a question purely for the discretion of the Court." *Ex parte Aberdeen*, 2 Dea. & Ch. 34.

ACQUIESCENCE.

1. Petitioning to enlarge the time for surrender, a slight act of acquiescence. Lying in prison under a commitment by commissioners, a strong act of acquiescence. Per Sir John Cross. *Ex parte Davy*, 1 Mont. & Ayr. 298.

2. Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to restrain him from bringing actions. *Ex parte Davy*, 1 Mont. & Ayr. 297.

ACT OF BANKRUPTCY.

1. The sale of the whole of a trader's stock to a *bonâ fide* pur-

chaser, who pays the fair price of it, in ignorance of any fraudulent intention of the seller, is not an act of bankruptcy, although the sale by the trader was, that he might abscond with the money and defraud his creditors. *Baxter v. Pritchard*, 3 Neville & Manning, 638. *Rose v. Haycock*, cited *ibid*.

2. The execution of a deed by which a trader conveys his whole property in trust for the benefit of some of his creditors is an act of bankruptcy, though not proved to have been acted on, or to have passed out of the trader's hands. *Botcherley v. Lancaster*, 1 Adol. & Ellis, 77. S. C. 3 Nev. & Man. 383.

3. A trader, being in debt to several persons, left this country in June 1831 for America, with some intention of returning, but did not actually return, nor make provision for the payment of all his debts. In September 1833 one of the creditors, whose debt was left unprovided for, issued a fiat against him: Held, that the continued absence of the bankrupt was an act of bankruptcy. *Ex parte Kirkman*, 1 Mont. & Ayr. 709. S. C. 3 Dea. & Ch. 450.

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4. Breaking an appointment, with an intent to delay creditors, is an act of bankruptcy. Per Sir John Leach. *Robinson v. Carrington*, 1 Mont. & Ayr. 13.

5. If a trader absent himself from his counting-house, and direct his clerk to say that he had been there during the time he was absent, it is evidence of absenting with intent to delay creditors, which is a question for the jury; and if the judge decide that the facts constitute an act of bankruptcy, the Court of Error will award a *venire de novo*. *Shannon v. Owen*, in error, 1 Man. & Ry. 392, in note (b).

6. Said in argument, that the question, Whether an assignment by a trader of all his property for the benefit of all his creditors is an act of bankruptcy? is yet open. *Botcherley v. Lancaster*, 3 Nev. & Man. 383.

N.B. In that case it was an act of bankruptcy, as it was an assignment for the joint creditors. See *Eckherd v. Wilson*, 8 T. R. 140.

7. A conveyance of part of a bankrupt's property, in trust to sell and dispose of the proceeds as he shall direct, is not an act of bankruptcy. *Robinson v. Carrington*, 1 Mont. & Ayr. 1.

8. Copyholds are within 27 Eliz. c. 4, against fraudulent conveyances. *Doe v. Bottirel*, 2 N. & M. 64. S. C. 5 B. & Adol. 131.

9. New fiat issued to give effect to more recent act of bankruptcy, time for opening not being expired. *Re Crawley*, 3 Dea. & Ch. 251.

See PREFERENCE.

ADJUDICATION.

1. Where there are not the requisites to support a fiat, the Chancellor

will recommend to the commissioner to hear counsel against the adjudication. Ex parte *Nokes*, 1 Mont. & Ayr. 461.

2. Adjudication stayed on affidavit that the party owed no debt to the petitioning creditor, and had not committed an act of bankruptcy, and that the fiat issued for vexatious purposes. Ex parte *Fletcher*, 2 Dea. & Ch. 90.

ADJOURNMENT SINE DIE.

Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show serious injury will accrue. Ex parte *Perkins*, 1 Mont. & Ayr. 524.

ADVERTISEMENT IN THE GAZETTE.

See STAYING THE, &c.

ADVANCING PETITION.

Petition not served cannot be advanced. Ex parte *Harding*, 1 Mont. & Ayr. 115.

AFFIDAVITS.

1. The office of affidavits is to explain allegations of the petition, and cannot supply the want thereof. Ex parte *Wyatt*, 1 Mont. & Ayr. 408.

2. All affidavits filed are considered as read, on the question of costs. Ex parte *Lucas*, 1 Mont. & Ayr. 405.

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3. An affidavit once filed cannot be withdrawn, to prevent the other side reading it. Ex parte *Labrey*, 3 Dea. & Ch. 232.

4. An affidavit not filed, read on an undertaking to file it. Ex parte *Baker*, 2 Dea. & Ch. 363.

5. Affidavits were referred to the registrar for scandal; he was prepared to report not scandalous, but had not yet certified. One party applied to restore the affidavits to the file, or annul the order taking them off; the other party stated exceptions to the certificate were prepared. The Court refused to act till the certificate was before it. Ex parte *Williamson*, 2 Dea. & Ch. 382.

6. The agent in London who files the affidavit is responsible for the costs of a reference for scandal, as between attorney and client, though the country attorney himself drew the affidavit. Ex parte *Wake*, 3 Dea. & Ch. 246.

7. Solicitor allowed to take affidavits off the file, to attend action therewith, undertaking to return them in the same state. Ex parte *Whalley*, 1 Mont. & Ayr. 634.

8. On hearing exceptions to the Master's report, only those of the affidavits can be read which, being filed on the original petition, were used before the Master. Ex parte *Grylls*, 2 Dea. & Ch. 290.

See IMPERTINENCE — PRACTICE, 2.
3. 4. 5.—EXCEPTIONS TO REPORT.

AGREEMENTS.

1. An agreement for a lease is not annulled by the insolvency of the intended lessor. *Crosby v. Tooke*, 1 Mont. & Ayr. 215, in note. S. C. 1 Mylne & Keen, 431.

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2. An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1 Mont. & Ayr. 214. S. C. 1 Mylne & Keen, 431. See *Brooke v. Hewitt*, 3 Ves. 255.

ALLOWANCE

To Bankrupt, or Per-centage.

1. Where the estate is exactly sufficient to pay 10s. in the pound, the bankrupt is not entitled to five per cent. allowance. Ex parte *Petheridge*, 2 Dea. & Ch. 137. S. C. Mont. & Bli. 161.

2. If the assignees distribute a sum without an order of dividend, and the bankrupt subsequently obtain his certificate, he is entitled to his allowance, as if they had still that sum in their hands. Ex parte *Lomas*, 1 Mont. & Ayr. 437.

3. Under a joint and separate fiat the bankrupt's allowance is to be calculated on the amount of his separate estate, together with his share of the joint estate, not on the gross amount of the joint estate. Ex parte *Lomas*, 1 Mont. & Ayr. 525.

4. One of two assignees admits that a sum was reserved by the assignees for future claims. The bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry, whether any part of this sum ever came to the hands of the surviving assignee. Ex parte *Coombes*, 2 Dea. & Ch. 319.

For Maintenance.

5. After the choice of assignees, the Court will not make an order, in the first instance, as to the bankrupt's allowance for maintenance. Ex parte *Hall*, 1 Mont. & Ayr. 450.

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To Clerks and Servants.

6. A clerk who has served the bankrupt six months is entitled to six months wages under section 48 of 6 G. 4. c. 16., although the bankrupt only *traded* during the last two months. Ex parte *Gough*, 3 Dea. & Ch. 189. S. C. Mont. & Bli. 417.

7. A clerk who engaged at two suits of clothes *per annum* and two guineas *a week* is a clerk within the 48th section of 6 G. 4. c. 16. Ex parte *Humphreys*, 3 Dea. & Ch. 114. S. C. Mont. & Bli. 413.

8. The guard of a stage coach hired at weekly wages is not a servant within the meaning of the 6 Geo. 4. c. 16. s. 48. Ex parte *Skinner*, 3 Dea. & Ch. 332.

9. Section 46, as to allowance of six months wages to servants, does not make any alteration in the legal effect of the contract of hiring, but merely legalizes the full payment of part of the wages due. *Thomas v. Williams*, 3 Nev. & Man. 549.

10. Where the bankruptcy of the master, after the hiring for a year, happens during the year, the demand for wages is not provable. *Thomas v. Williams*, 3 Nev. & Man. 545.

To Official Assignee.

See JURISDICTION OF THE COURT OF REVIEW, 7. 14.

AMENDING FIAT.

See FIAT, AMENDING.

Amending Petition.

When a petition has been half heard, it cannot be amended on payment merely of the costs of the day. Ex parte *Turvill*, 3 Dea. & Ch. 346.

See COSTS, 11.

ANNUITY.

See DEBT PROVABLE, 30.

ANNULLING FIAT.

See SUPERSEDEAS.

ANSWERING PETITION.

A petition will not be answered *nunc pro tunc* where affidavits have been sworn. Ex parte *Peake*, 1 Mont. & Ayr. 309.

APPEALS.

1. An objection that the Court of Review had no jurisdiction cannot be taken on appeal, if not taken below. Ex parte *Turner*, 1 Mont. & Ayr. 357.

2. Where a party wishes to appeal on petition instead of special case, he must apply ex parte to have the matter heard on petition; and the respondent may subsequently move to set the order aside if improperly obtained. Ex parte *Keys*, 1 Mont. & Ayr. 233. S. C. 3 Dea. & Ch. 266.

3. On an appeal from the Court of Review on a special case, the Chancellor will not at the hearing permit the appellant to present a petition for liberty to proceed "otherwise" for the purpose of rectifying an error in the settlement of the special case. Ex parte *Low*, 1 Mont. & Ayr. 189.

4. There may be an appeal to the Great Seal on matters of *practice*. Per Lord Chancellor, 1 Mont. & Ayr. 240.

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5. On an appeal in bankruptcy, the appellant begins. Ex parte *Belcher*, 3 Dea. & Ch. S. C. Mont. & Bli. 290.

6. Whether or not a man be a trader, is a question of fact on which an appeal does not lie to the Lord Chancellor. Ex parte *Hinton*, 2 Dea. & Ch. 407.

APPORTIONMENT.

Part of the advances to a bankrupt on a running account arose out of legal, and part out of illegal, transactions; he from time to time made payments without any specific appropriation or settlement of account: Held, the payments must be appropriated to the earlier items, and on account of the legal items. Ex parte *Randleson*, 2 Dea. & Ch. 534.

ARREST.

1. If a party, discharged by the Lord Chancellor from a commitment by commissioners on habeas corpus be arrested for debt on his way home, it is a great contempt; and every person concerned may be committed. Per Lord Chancellor. Ex parte *Lampon*, 1 Mont. & Ayr. 256.

2. A witness from Gravesend having attended the Court of Review pursuant to a summons, was arrested for debt in Pancras Lane, City, while waiting for the conveyance home; he was discharged, although he had on leaving the court gone to Catherine Street, Strand. But without costs as against the officer, the witness not having shown the summons to attend the court. Ex parte *Clarke*, 2 Dea. & Ch. 99.

ASSIGNEES.

Assignment to.

1. Upon a new choice of assignees there is no necessity to vacate the assignment under a commission issued prior to 1 & 2 W. 4. c. 56. *Smith v. De Tastet*, 1 Mont. & Ayr. 370.

Their Liabilities.

2. Any party has a right to come to the Court for relief against the acts of the assignees, in respect of all acts done by them as such. Per Chief Judge. Ex parte *Clegg*, 1 Mont. & Ayr. 92.

3. If the assignees continue to defend a suit, instituted against the bankrupt, which is decided in favour of the plaintiff with costs, and they have no assets, they are not personally liable unless they vexatiously continued the defence. Ex parte *Kindersley Castle*, 1 Mont. & Ayr. 479, *in note*.

4. Upon issuing a renewed country fiat, the assignees or the solicitor must ascertain whether the commissioners will act, otherwise they are liable to the costs of a new fiat if it be necessary. Ex parte *Wilkinson*, 2 Dea. & Ch. 112.

5. If the assignees promise the landlord, who has distrained, that if he will withdraw the man in possession he shall be paid out of the produce of a sale of the effects by the assignees; this is an absolute promise, and the assignees liable, though the fiat be afterwards superseded. *Stevens v. Bell*, 4 Tyrr. 6.

6. One of two assignees admits that a certain sum was reserved by the assignees for future claims. The bankrupt, on a petition for his allowance after the death of this assignee, is entitled to an inquiry whether any part of this sum ever

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came to the hands of the surviving assignee. Ex parte *Coombes*, 2 Dea. & Ch. 319.

7. If one of the assignees pay a dividend to a person not duly authorized to receive it, the two other assignees are responsible to the creditor for the dividend. Ex parte *Winnall*, 3 Dea. & Ch. 22.

8. A bankrupt did not disclose a life interest which he possessed in certain property when he passed his last examination; and after the lapse of twenty years, when four of the commissioners were dead, he petitioned for a fiat to be issued to fresh commissioners, and that the assignee might be ordered to account. The Court allowed the bankrupt to issue a new fiat in the name of a creditor, but held that after this concealment he was not entitled to an inquiry against his assignee. Ex parte *Holder*, 3 Dea. & Ch. 276.

9. A London banker, having a branch bank at Edinburgh, stopped payment on the 2d of January, and wrote to his agent at Edinburgh, apprising him of the fact, and directing the business of the branch bank to be discontinued on the 4th of January. Before this notice reached the agent, the petitioner paid into the Edinburgh bank 305*l.* 15*s.* in notes and cash, to be remitted to the house in London; but after the news reached Edinburgh, and whilst the notes were still in the agent's possession, gave him notice not to part with them, and they remained in his hands on the 26th of January, when a fiat issued against the banker. The agent at Edinburgh having a lien on the funds in his hands, the assignees permitted him to retain the 305*l.* 15*s.* in part satisfaction of his lien. Held, that the assignees were bound to send this sum to the petitioners.

Ex parte *Cunningham*, 3 Dea. & Ch. 58. Confirmed on re-hearing, 3 Dea. & Ch. 73. S. C. Mont. & Bli. 269. Confirmed on appeal, ex parte *Belcher*, 3 Dea. & Ch. 87. S. C. Mont. & Bli. 286.

10. The same order made as in ex parte *Cunningham*, although the notes delivered to the banker's agent were not identified. Ex parte *Solomons*, 3 Dea. & Ch. 77. S. C. Mont. & Bli. 308.

11. The same order made as in ex parte *Cunningham*: The notes in this case were paid in by the customer on the 3d of January, to a sub-agent of the banker at Glasgow, who remitted them on the 4th to the banker's managing agent at Edinburgh. Ex parte *Wylie*, 3 Dea. & Ch. 82.

12. Maberly and a Scotch Bank mutually exchanged their notes at stated times, through an agent, Blythe; Maberly became bankrupt, his agent Blythe having notes of the Scotch Bank in his hands; the assignees subsequently allowed Blythe to retain the notes in account with them, he having claims against Maberly. Held, the Scotch Bank could recover these notes against the assignees. Ex parte *National Bank of Scotland*, 1 Mont. & Ayr. 644.

13. A custom of exchanging acceptances existed between the bankrupt and other houses, through the agency of Blythe. Notes were sent by the petitioner to Blythe, but never exchanged, as bankruptcy intervened, and they were stolen from Blythe, and never formed any item in any settlement between Blythe and the assignees: Held, the petitioner could not recover the value of the notes from the assignees. Ex parte *Watson*, 1 Mont. & Ayr. 685.

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14. Although an audit meeting has closed, and the assignee's accounts are then settled, the commissioners have power to examine the assignees at any future meeting as to monies not included in such accounts, and generally to re-investigate those accounts. Re *Applegarth*, 2 Dea. & Ch. 101.

See COMMISSIONERS, 6.

Must act for themselves.

15. The Court will not interfere to direct assignees how to sell the estate. Ex parte *Belcher*, 1 Mont. & Ayr. 478.

16. The Court will not direct the assignees how to sell the estate; that is for their discretion. Ex parte *Hurly*, 2 Dea. & Ch. 631.

17. The Court will not interfere on the application of the assignees to sanction an arrangement made by them for the satisfaction of a claim of the bankrupt's wife. The assignees must use their own discretion. Ex parte *James*, 3 Dea. & Ch. 290.

18. On the application of a tenant of the assignees, a reference was made to the commissioner, who reported the rent should be reduced, which was done. On the application of some creditors, one of whom offered higher rent, the Court refused to interfere. Ex parte *De Begnis*, 1 Mont. & Ayr. 277.

19. The Court will not lend its sanction to a compromise of a suit by assignees, though the Master reports it would be for the benefit of all parties. Ex parte *Williams*, 1 Mont. & Ayr. 689.

New Choice.

20. Upon a new choice of assignees there is no necessity to vacate the assignment under a commission

issued prior to 1 & 2 W. 4. c. 56. *Smith v. De Tastet*, 1 Mont. & Ayr. 370.

Petition by.

21. A petition by assignees is informal, if signed only by one. Ex parte *White*, 3 Dea. & Ch. 366.

Purchases by.

22. The Court will not confirm a purchase of part of the bankrupt's estate made by an assignee without leave, because a meeting of creditors has consented. Ex parte *Thwaites*, 1 Mont. & Ayr. 323.

23. An assignee cannot purchase part of the bankrupt's property as trustee for another, and, after a twelvemonth, purchase the same for his own use. Ex parte *Grylls*, 2 Dea. & Ch. 290.

Reserved Biddings by.

24. The Court will not allow the assignees to have a reserved bidding on the sale of an equitable mortgage. Ex parte *Barnard*, 3 Dea. & Ch. 291.

25. A reserved bidding allowed to assignees on the sale of an estate which had been mortgaged by the bankrupt, they undertaking to pay the mortgagee his principal, interest, and costs. Ex parte *Ellis*, 3 Dea. & Ch. 297.

Bidding.

26. An assignee can have leave to bid, under very special circumstances only. The consent of a meeting of some of the creditors is not sufficient. Ex parte *Beaumont*, 1 Mont. & Ayr. 304.

Removal, &c.

27. Where the assignees refuse to bring an action for the recovery of

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property, alleged by a creditor to have been the bankrupt's, the Court will not order a new choice of assignees, but permit the creditor to bring the action in the name of the assignees, he giving them an indemnity. Ex parte *Ryland*, 2 Dea. & Ch. 392.

28. Assignees are not removable because proofs were rejected, unless indeed fraudulently procured to be rejected. Ex parte *Milner*, 3 Dea. & Ch. 235.

29. If the creditors who elect an assignee be relations, and their debts *prima facie* of a doubtful nature, the assignee might be removed without serving the creditors. Per Chief Judge. Ex parte *Copeland*, 1 Mont. & Ayr. 307.

30. Mere poverty no ground to remove an assignee. Per Chief Judge. Ex parte *Copeland*, 1 Mont. & Ayr. 306.

31. If a sole assignee be very poor, and alleged to be in insolvent circumstances, and elected by suspicious votes, a co-assignee may be appointed. Ex parte *Copeland*, 1 Mont. & Ayr. 305.

Suits by.

32. In a suit by the assignees of a bankrupt's or insolvent's estate, it is not competent to the bankrupt or insolvent to object that the suit has been instituted without the consent of the major part of the creditors, as is required by the bankrupt and insolvent acts. The judgment in such a suit will bind the creditors; but the assignees take on themselves the responsibility that the suit has been properly instituted and conducted. *Piercy v. Roberts*, 1 Mylne & Keen, 4.

33. If the assignees continue a suit commenced by the bankrupt before his bankruptcy, they must

find security for costs for the proceedings, as well before as since the fiat. *Mason v. Polhill*, 3 Tyrw. 595.

See SHERIFF.

General.

34. Trust estates do not vest in the assignees: the words of the 79th section of 6 Geo. 4. c. 16. as to assignees conveying trust estates are superfluous. Ex parte *Painter*, 2 Dea. & Ch. 584.

35. Where there are cross acceptances, and the right of set off clear, the Court will restrain the assignees from bringing an action. Ex parte *Clegg*, 1 Mont. & Ayr. 91.

36. If a bill in equity by assignees be dismissed with costs, they must apply to the commissioner in the first instance to allow them out of the estate. Ex parte *Gibson*, 1 Mont. & Ayr. 479. The Lord Chancellor cannot order them. *Turner v. Herbert*, 1 Mont. & Ayr. 243.

37. If in replevin for goods distrained by the petitioning creditor, the defendant, the petitioning creditor, in his avowry, pray a return of the goods, as goods originally belonging to the plaintiff, he cannot plead that the goods belonged to himself and two others as assignees. *Middleton v. Mucklow*, 10 Bing. 401.

38. Where a creditor writes to assignees to pay "the dividends to *A. B.*" they are justified in paying subsequent dividends to *A. B.* until they have notice that *A. B.*'s authority is revoked. Ex parte *Bright*, 2 Dea. & Ch. 8.

39. Assignees may be ordered to furnish a creditor who has proved with a copy of their accounts, if he offers to pay the expence of such copy; but, per Chief Judge, "it is a

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question purely for the discretion of the Court." Ex parte *Aberdeen*, 2 Dea. & Ch. 34.

See ESTATE TAIL.

ATTACHMENT.

1. When a prisoner will be discharged from an attachment for non-payment of money, the process being irregular. Ex parte *Malachy*, 1 Mont. & Ayr. 257.

ATTESTATION.

1. The same strictness as formerly is not insisted on as to attestation. Ex parte *White*, 3 Dea. & Ch. 366.

2. The attestation to a petition to stay the certificate cannot be amended. See *dictum* to that effect per Sir G. Rose. Ex parte *Tanner*, 2 Dea. & Ch. 565.

3. A petition to stay the certificate and supersede was presented: on being called on, the petitioner agreed to withdraw the prayer as to the certificate, and to let the petition stand over, without prejudice, to be heard as to the supersedeas, held a waiver of an informal attestation. Ex parte *Tanner*, 2 Dea. & Ch. 563. S. C. Mont. & Bli. 390.

4. "Signed by the petitioners, *A. B.* and *C. D.*, in the presence of *T. S.*, acting as solicitor for *T. A.*" it appeared *T. A.* was not a solicitor of the Court. Semble the attestation is good. Ex parte *Tanner*, 2 Dea. & Ch. 563. S. C. Mont. & Bli. 390.

AUXILIARY FIAT.

See FIAT, AUXILIARY.

BANKRUPT, SUITS BY.

1. If a bankrupt be made defendant to an action with a trustee, and a decree be, in his absence, pronounced against him, and he be afterwards allowed to come in without the trustee, and defend the action, he cannot be compelled to find security for costs. *Taylor v. Fairlie*, 1 Clarke & Finnelly, 355.

2. If a bankrupt take the conduct of the defence out of the hands of his assignees, it may be proper to compel him to give security for the costs. *Taylor v. Fairlie*, 1 Clarke & Finnelly, 361.

BANKRUPTCY OF TRUSTEE.

Bankrupt trustee removed, and ordered to convey to new trustees. Ex parte *Painter*, 2 Dea. & Ch. 584.

BANKRUPTCY OF EXECUTOR.

1. Bankrupt executor allowed to prove against his own estate; dividends to be paid into the hands of the accountant-general. Ex parte *Colman*, 2 Dea. & Ch. 584.

BANKRUPTCY OF PETITIONING CREDITOR.

Petitioning creditor becoming bankrupt before opening. Ex parte *Smith*, 3 Dea. & Ch. 309.

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BARGAIN AND SALE.

Under a new choice of assignees there is no need to vacate the assignment under a commission issued prior to the 1 & 2 W. 4. c. 56. *Smith v. De Tastet*, 1 Mont. & Ayr. 370.

See ESTATE TAIL.

BIDDINGS BY ASSIGNEES.

See ASSIGNEES, 26.

CASES CONFIRMED.

Carlisle v. Garland confirmed in the Exchequer Chamber. 10 Bing. 298. For affirming: — Gurney, Taunton, Parke, Littledale. For reversing: — Bolland, Vaughan, Bayley, Denman.

CASES OVER-RULED.

Anon. Buck, 475, ut semble. Ex *Coates*, 1 Mont. & Ayr. 328.

CERTIFICATE.

1. A joint certificate, upon the death of one of the bankrupts becomes a separate certificate. Ex parte *Carter*, 1 Mont. & Ayr. 115.

2. Where an order of Court is necessary to enable a party to prove, he cannot vote in the choice, or sign the certificate. Ex parte *Wyatt*, 2 Dea. & Ch. 211.

3. The certificate under a fraudulent commission is no protection against a supersedeas. Ex parte *Wyatt*, 1 Mont. & Ayr. 407.

4. It seems the assignees, and not the bankrupt, pay the fee for the signature of the commissioner to the certificate. Re *Dawson*, 3 Dea. & Ch. 317.

5. It seems that a sole executor who becomes bankrupt may sign his own certificate. Re *Lawrence*, 1 Mont. & Ayr. 453.

6. A power of attorney to sign the bankrupt's certificate, executed abroad, is sufficiently authenticated by the attestation of a British consul. Ex parte *Wilkinson*, 2 Dea. & Ch. 585. S. C. Mont. & Bli. 257.

7. A power of attorney from a creditor residing abroad to sign the bankrupt's certificate is sufficiently authenticated by the attestation of a notary public, without any affidavit to verify the signature. Ex parte *Myers*, 2 Dea. & Ch. 406.

8. Semble, that a creditor who has signed the certificate by attorney cannot stop the certificate by subsequently withholding an affidavit verifying his signature to the power. Ex parte *Dunstan*, 1 Mont. & Ayr. 619.

9. A petition to stay the certificate in order to prove, must show that the petitioner's debt would turn the certificate. Ex parte *Skipp*, 2 Dea. & Ch. 88. S. C. Mont. & Bli. 262.

10. Where the certificate has been stayed by creditors who afterwards withdraw their opposition, and consent to its allowance, the Court will allow the certificate without the usual explanatory affidavit. Re *Hall*, 2 Dea. & Ch. 44. S. C. rather differently reported, Mont. 508.

11. Quære, Whether the discharge under a certificate be from the time of allowance or enrolment? *Jacobs v. Phillips*, 1 Cro., Mee., & Ros. 195.

DIGEST.

12. A certificated bankrupt cannot be discharged from arrest for a debt till his certificate is enrolled, but the Court will enlarge the rule till the enrolment. *Jacobs v. Phillips*, 4 Tyr. 652.

13. Doubt has been expressed whether the certificate is a bar for costs, when the only remedy is against the person. *Jacobs v. Phillips*, 4 Tyr. 660.

14. Costs, when connected with a proveable demand, as on a judgment on a verdict for a debt obtained before the bankruptcy, are barred by the certificate. D. Lord Lyndhurst. *Jacobs v. Phillips*, 1 Cro., Mee., & Ros., 195.

15. The certificate is a bar to a claim for interlocutory costs taxed before the bankruptcy. *Jacobs v. Phillips*, 1 Cro., Mee., & Ros., 195.

16. If the trial of a cause be postponed by order of Court of N. P., on the defendant's application, on the terms of his paying the costs of the day, and the order be made a rule of Court, and the costs taxed, the demand for them is barred by the subsequent bankruptcy of the defendant. *Jacobs v. Phillips*, 4 Tyr. 652.

17. If an attorney receive money to the use of his clients, and not account for it, and become bankrupt, and obtain his certificate, the Court will not, on motion, order him to repay the money, the debt being barred by the certificate; but if fraud appear clear, query, Whether the Court, in the exercise of its jurisdiction over its officer, will enforce the payment as a modification of punishment which the Court would otherwise inflict? In re *Bonner*, 4 Barn. & Adol. 811. S. C. 1 Nev. & Man. 555.

18. By the bankruptcy and certificate of the husband, debts con-

tracted by the wife of the bankrupt, *dum sola*, are extinguished, and do not revive against her upon the death of the husband. That which is called "separate property of the wife," consisting of property in which the legal ownership is in others, though held for her benefit, cannot, in a court of law, affect the operation of the discharge of the husband by his certificate in extinguishing the antenuptial debts of the wife. If it could, the existence of such property should be replied specially to a plea setting up such discharge, &c. but would form no objection to such plea or demurrer. *Lockwood v. Salter*, 2 Nev. & Man. 255.

19. If upon the grant of an annuity the grantor covenant to charge any property that he might become possessed of at his wife's death, either under her will or otherwise, with the payment of the annuity, and afterwards become bankrupt, and obtain his certificate, after which his wife die, having under a power in her settlement bequeathed to him an annuity of 700*l.*, the grantee is entitled to have the annuity of 700*l.* charged with the payment of the annuity granted by the bankrupt. *Lyde v. Mynn*, 4 Sim. 505. S. C. 1 Milne & Keen, 683.

20. If a co-surety with the bankrupt be compelled to pay the debt after the bankruptcy, the certificate is not a bar to an action for contribution. *Clements v. Langley*, 2 Nev. & Man. 269.

21. After stay of proceedings in an action upon the bail-bond, there may be a plea of bankruptcy in the original action, where the bail-bond is not ordered to stand as a security. *Swainsbury v. Gandon*, 3 Mann. & Ry. 16.

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22. The certificate no bar to prevent a legatee or devisee from pursuing the assets which the bankrupt has as executor or administrator. Per Bayley, B. *Searle v. Bradshaw*, 4 Tyrw. 70.

See ATTESTATION, 2. 3.—PETITION, FORM OF, 3. 4. 7.

CLAIM.

1. A party, being ordered to pay money into Court, became bankrupt without having done so; a supplemental bill was filed against his assignees, but they had not appeared: A claim was allowed to be entered for the sum by the plaintiff. Ex parte *Hancock*, 1 Mont. & Ayr. 220. S. P. ex parte *Farden*, 1 Mont. & Ayr. 219.

CLERKS.

See ALLOWANCE TO CLERKS, 6. 7.

COMMISSIONERS.

1. A bankrupt is bound to answer touching his estate, though his answer may tend to convict him of perjury on a former occasion, and of concealing his effects when he passed his last examination. Cross, J., dissent., on the ground of the assignee's motive in putting the question. Re *Smith*, 2 Dea. & Ch. 230. S. C. Mont. & Bli. 203.

2. A bankrupt is bound to answer questions as to his property, although his answer may tend to convict him of concealing his effects. Re *Feaks*,

2 Dea. & Ch. 227. S. C. Mont. & Bli. 215.

3. Semble, a bankrupt is bound to disclose what has become of his property, although an indictment is pending against him for concealing it, &c., and although his answer may tend to criminate him. Cross, J., dubitan. Re *Heath*, 2 Dea. & Ch. 214. S. C. Mont. & Bli. 184.

4. A bankrupt having sold goods for considerably less than he gave for them, the purchaser summoned before the commissioners must answer this question, "To whom did you subsequently sell these goods." In re *Falk*, 2 Dea. & Ch. 415.

5. Where the commissioners find the petitioning creditors debt insufficient, they should also find that the debt proposed to be substituted was incurred not anterior to the present one. Ex parte *Hunter*, 2 Dea. & Ch. 507.

6. The commissioners have no power, under the 106th section of 6 Geo. 4. c. 16., to charge the assignees with what, but for their wilful default, they might have received. Ex parte *Keys*, 2 Dea. & Ch. 633.

7. If a bill in equity by assignees be dismissed with costs, they must apply to the commissioner, in the first instance, to allow them out of the estate. Ex parte *Gibson*, 1 Mont. & Ayr. 479.

8. Where no charge is made against commissioners in a petition served on them, they need not appear. Ex parte *Perkins*, 1 Mont. & Ayr. 525.

9. Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show serious injury will accrue. Ex parte *Perkins*, 1 Mont. & Ayr. 524.

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10. *Quære*, Whether the commissioners can convey an estate tail after the death of the bankrupt?

The commissioners would not do wrong in executing a conveyance to enable the question to be tried. *Ex parte Somerville*, 1 Mont. & Ayr. 408.

11. On an unsuccessful application to the commissioners to expunge a debt under 6 G. 4. c. 16. s. 60. the commissioners may order the applicant to pay the commissioners and solicitor's fees, and sums for the use of the room, &c. *Ex parte Kirkaldy*, 1 Mont. & Ayr. 642.

See JURISDICTION OF THE COURT OF REVIEW, 4. 5. 6. 7. 8.—COSTS, 9.

COMMITTAL.

1. The Subdivision Court cannot commit on an adjourned examination, after merely asking, "Do you abide by your former answers?" The party must be re-examined. *Ex parte Bardwell*, 1 Mont. & Ayr. 193.

2. If a bankrupt be examined before one commissioner, and committed to the custody of the messenger, and after a short time brought before two commissioners, who ask a few questions and commit him, the committal is bad. *Ex parte Lampon*, 1 Mont. & Ayr. 245.

3. A recital on a warrant that the party was "suspected to have obtained part of the bankrupt's goods by means of fictitious sales," is not objectionable. *Ex parte Bardwell*, 1 Mont. & Ayr. 200.

4. The warrant need not set out the precise answers with which the commissioners were dissatisfied. *Ex parte Bardwell*, 1 Mont. & Ayr. 202.

5. Collateral questions, trying the truth of a material part of a witness's story, may be put. *Ex parte Bardwell*, 1 Mont. & Ayr. 206.

6. The Chancellor may commit for a contempt in bankruptcy. *Dicas v. Lord Brougham*, 6 C. & P. 351.

7. An action does not lie against the Chancellor for a commitment on an erroneous judgment pronounced by him sitting in bankruptcy. *Dicas v. Lord Brougham*, 6 C. & P. 269.

8. A party ought not to be committed for disobeying an order to pay money, without a demand and refusal. *Dicas v. Lord Brougham*, 6 C. & P. 255.

9. There ought, as it seems, to be a demand and refusal after the four day order. *Dicas v. Lord Brougham*, 6 C. & P. 256.

10. *Semble*, a bankrupt is bound to disclose what has become of his property although an indictment is pending against him for concealing it, &c. and although his answer may tend to criminate him. *Cross, J.*, dubitan. *Re Heath*, 2 Dea. & Ch. S. C. Mont. & Bli. 184.

11. A bankrupt is bound to answer questions as to his property, although his answer may tend to convict him of concealing his effects. *Re Feaks*, 2 Dea. & Ch. 227. S. C. Mont. & Bli. 215.

12. A bankrupt is bound to answer touching his estate, though his answer may tend to convict him of perjury on a former occasion, and of concealing his effects when he passed his last examination. *Cross, J.*, dissent. on the ground of the assignees motive in putting the question. *Re Smith*, 2 Dea. & Ch. 230. S. C. Mont. & Bli. 203.

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13. A bankrupt having sold goods for considerably less than he gave for them, the purchaser summoned before the commissioners must answer this question, "To whom did you subsequently sell these goods?" In re *Falk*, 2 Dea. & Ch. 415.

14. An application to be discharged from custody, on the ground of insufficiency of the warrant by the commissioners, must be made by petition. Ex parte *Jones*, 1 Mont. & Ayr. 703.

COMPOSITION DEED.

After payment of the first instalment under a composition deed not containing a release, a fiat issued against the debtor, the creditors may prove for the residue, without refunding the instalment, being protected by the 82d section of 6 Geo. 4. c. 16. Ex parte *Wood*, 2 Dea. & Ch. 508.

See SET-OFF, 4.

CONCERT.

A concerted bankruptcy may be superseded, if application be made promptly. Ex parte *Mills*, 1 Mont. & Ayr. 311.

CONSENT OF MEETINGS OF CREDITORS.

See MEETINGS OF CREDITORS.

CONSOLIDATION.

1. The joint estate and separate estates will not be consolidated if

one creditor dissent, unless it be impracticable to keep separate accounts. Ex parte *Sheppard*, 3 Dea. & Ch. 190. S. C. Mont. & Bli. 415.

2. Where the joint and separate creditors, at a meeting duly convened for that purpose, agree to consolidate the two estates, the Court will not act on such a resolution alone, so as to bind the interests of absent creditors, but refer to the commissioners to certify whether it be for the general benefit. Ex parte *Part*, 2 Dea. & Ch. 1.

3. If two proofs be made on a joint and several bond against two separate estates, a subsequent consolidation of the estates does not affect the double proof. Ex parte *Fuller*, 1 Mont. & Ayr. 222.

CONTRIBUTION.

If a co-surety with bankrupt be compelled to pay the debt after the bankruptcy, the certificate is not a bar to an action for contribution. *Clements v. Langley*, 2 Nev. & Man. 269.

CONSTRUCTION OF STATUTES.

11 The 127th section of 6 Geo. 4. c. 16. is retrospective. *Elston v. Braddick*, 4 Tyrw. 122.

2. Section 132 of 6 Geo. 4. c. 16. as to interest is not retrospective. Ex parte *Phillips*, 1 Mont. & Ayr. 674.

3. As to the construction to be put on section 56 of 6 Geo. 4. c. 16. see ex parte *Marshall*, 1 Mont. & Ayr. 118, 145. S. C. 3 Dea. & Ch. 120. Ex parte *Sinclair*, 1 Mont. & Ayr. 541.

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4. An execution on a judgment on a warrant of attorney is not protected by 1 W. 4. c. 56. s. 7., but is within the 108th section of 6 G. 4. c. 16. *Crossfield v. Stanley*, 1 Nev. & Man. 669. S. C. 4 Barn. & Adol. 87.

5. A loan of money on a pledge is not protected by section 82 of 6 Geo. 4. c. 16. *Cannon v. Denew*, 10 Bing. 296.

6. A payment on a sale of goods is protected by section 82 of 6 Geo. 4. c. 16. Per Tindal, C. J. *Cannon v. Denew*, 10 Bing. 296.

8. As to what clauses of 6 Geo. 4. c. 16. are or are not retrospective, see note 1 Mont. & Ayr. 674.

CONVEYANCE BY BANKRUPT.

The Court will order the bankrupt to convey under section 78 of 6 Geo. 4. c. 16. Ex parte *Jackson*, 2 Dea. & Ch. 458.

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Are within the 27 Eliz. c. 4. as to fraudulent conveyances. *Doe v. Bottirell*, 2 Nev. & Mann. 64. S. C. 5 Barn. & Adol. 131.

COSTS.

1. Costs of petitions, &c. in the Court of Review are taxed by a registrar of that court. Ex parte *Reay*, 2 Dea. & Ch. 586.

On Petitions against Decision of Commissioners.

2. On an unsuccessful petition to expunge, costs given out of the

estate, as the commissioners doubted. Ex parte *Fuller*, 1 Mont. & Ayr. 222.

3. Costs allowed out of the estate to the unsuccessful party, on a petition to prove, where the commissioners had exercised jurisdiction. Ex parte *Hooper*, 1 Mont. & Ayr. 403.

4. When the commissioners have exercised their judgment with respect to a proof of debt, and have refused to admit it, the successful petitioner against their decision is not entitled to costs; it being a general rule that costs cannot be so given when commissioners exercise their jurisdiction. Ex parte *Millington*, 1 Mont. & Ayr. 114. S. C. 3 Dea. & Ch. 298.

5. The costs of a petition to prove must be paid by the creditor if he adduce new evidence; if he succeed on evidence which was tendered before the commissioners, and rejected, it seems he might be entitled to costs. Ex parte *Price*, 1 Mont. & Ayr. 51.

6. The commissioners rejected a proof tendered for 3,500*l.*; the creditor petitioned, and an order was made, by consent, for a proof of 500*l.* Each party ordered to pay his own costs. Ex parte *Waterhouse*, 3 Dea. & Ch. 108.

7. Costs of petition to prove paid out of the estate, under the circumstances. Ex parte *Reay*, 3 Dea. & Ch. 175.

9. Where a party petitions against the decision of the commissioners, and an action is directed to be brought, the result of which is in his favour, he is not entitled to the costs of the petition, but only to the costs of the action. Ex parte *Millington*, 3 Dea. & Ch. 309.

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Generally.

9. Where unfounded charges of corruption were brought against commissioners by an illiterate petitioner, who was the tool of the bankrupt, the Court ordered the commissioners their costs, charges, and expences, and suspended the order until the petitioner's attorney showed cause why he should not personally pay the same. Ex parte *Williams*, 3 Dea. & Ch. 103.

10. In order to fix the executor of the petitioning creditor with costs, the petition must pray costs against him in his character of executor. Ex parte *Harwood*, 3 Dea. & Ch. 252.

11. Where notice is given for leave to amend the petition, which is ordered after the respondent appears to oppose it, the latter will not be entitled to the costs of the day. Ex parte *Green*, 2 Dea. & Ch. 42.

12. Where former petition of bankrupt was by the Vice-Chancellor dismissed on the merits with costs, to be paid by the bankrupt, who is in contempt for non-payment thereof, a new petition in this court to supersede was ordered to stand over till he had cleared his contempt by paying the former costs. Ex parte *Munk*, 2 Dea. & Ch. 125.

13. Where an order made in bankruptcy reserves further directions and costs, a subsequent application to the Court as to the costs merely may be entertained by motion; but if it is by way of further directions, it must be by petition. Ex parte *Shadbolt*, 2 Dea. & Ch. 286.

14. When a commission is superseded on a point of law, costs are given only against the petitioning creditor; but when superseded on

the ground of fraud, then costs are given against all the parties implicated. Per Sir G. Rose. Ex parte *Tanner*, 2 Dea. & Ch. 572. S. C. Mont. & Bli. 393.

15. When a fiat is annulled for want of the requisites, it is always at the costs of the petitioning creditor. Ex parte *Fletcher*, 2 Dea. & Ch. 374.

16. Costs of substituting new petitioning creditor's debt ordered to be paid by petitioning creditor, under the circumstances. Ex parte *Lloyd*, 2 Dea. & Ch. 506.

17. If an order upon a petition by assignees to supersede an invalid commission does not, through mistake, include the assignees' expences of prosecuting the commission, the error cannot be rectified by a petition of rehearing.

Qy. Whether the petitioning creditor be liable?

Ex parte *Burnell*, 1 Mont. & Ayr. 38.

18. On a discharge under the Habeas Corpus Act the prisoner's costs paid by the assignees, the estate being sufficient to recoup them. Ex parte *Bardwell*, 1 Mont. & Ayr. 193.

19. If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained by the assignees out of the bankrupt's estate. *Turner v. Hibbert*, 1 Mont. & Ayr. 243.

20. If assignees continue to defend a suit instituted against the bankrupt, which is decided in favour of the plaintiff, with costs, and they have no assets, they are not personally liable, unless they vexatiously continue the suit. Ex parte *Kindersley Castle*, 1 Mont. & Ayr. 479, in note.

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21. If a bill in equity by assignees be dismissed with costs, they must apply to the commissioner in the first instance to allow them out of the estate. *Ex parte Gibson*, 1 Mont. & Ayr. 479.

22. When a petition stands over to serve a necessary party, costs of the day are not of course. *Ex parte Thompson*, 1 Mont. & Ayr. 313.

23. The Court can order the bill of costs, subsequent to the choice, to be paid, though the assignees have no assets in their hands. *Ex parte Coates*, 1 Mont. & Ayr. 328.

24. All affidavits filed are considered as read on the question of costs. *Ex parte Lucas*, 1 Mont. & Ayr. 405.

25. An official assignee, not served, appeared: Held, if the commissioner actually directed him to appear, he might take his costs out of the estate, *secus* if only leave were given. *Ex parte Patrick*, 1 Mont. & Ayr. 393.

26. If an official assignee be included in an order for payment of costs, the order may be enforced against him alone. *Ex parte Murray*, 1 Mont. & Ayr. 475.

27. No rehearing as to costs alone. *Ex parte Burnell*, 2 Dea. & Ch. 640.

28. The rule that no petition of rehearing is allowed for costs only does not apply, *come semble*, to a petition for rehearing on the ground of an erroneous decision on the merits, though the material effect of such decision may be to render the party liable to costs. *Ex parte White*, 2 Dea. & Ch. 334.

29. A party ought not to be committed for disobeying an order to pay money without a demand and refusal. *Dicas v. Lord Brougham*, 6 C. & P. 445.

30. There ought, it seems, to be a demand and refusal after the four day order. *Dicas v. Lord Brougham*, 6 C. & P. 256.

31. When a prisoner will be discharged from an attachment for nonpayment of costs, the process being irregular. *Ex parte Malachy*, 1 Mont. & Ayr. 257.

32. On an unsuccessful application to the commissioners to expunge a debt under 6 Geo. 4. c. 16, s. 76. the applicant may be ordered to pay the commissioners' and solicitor's fees, and sums for the use of the room, &c. *Ex parte Kirhaldy*, 1 Mont. & Ayr. 642.

Security for.

33. The application for security for costs is *strictissimi juris*. Examining a witness before the commissioner as to the matter of the petition, and an application to the Court that the registrar may attend at the hearing with such examination, is a waiver of the right. *Ex parte Tull*, 1 Mont. & Ayr. 80.

34. Court will not, under any circumstances, before hearing, order bankrupt to give security for costs. *Ex parte Munk*, 2 Dea. & Ch. 121.

35. Security for costs not required from a bankrupt plaintiff resident abroad, in action to try the validity of the commission. *Roper v. Phillips*, 3 Man. & Ry. 84.

36. If a bankrupt be made defendant to an action with a trustee, and a decree is, in his absence, pronounced against him, and he be afterwards allowed to come in without the trustee, and defend the action, he cannot be compelled to find security for costs. *Taylor v. Fairlie*, 1 Clarke & Finelly, 355.

37. If a bankrupt take the conduct of the defence out of the hands

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of the assignees, it may be proper to compel him to give security for the costs. D. Lord Chancellor. *Taylor v. Fairlie*, 1 Clarke & Finnelly, 369.

38. The Court will not order a petitioner residing out of its jurisdiction to give security for or pay into Court a sum of money which he had been declared entitled to by a previous order, merely because the respondent intends to appeal against the order if there be no probability of a different decision on the appeal. Ex parte *Davidson*, 3 Dea. & Ch. 447.

39. If the assignees continue an action commenced by the bankrupt before his bankruptcy, they must find security for the costs of the proceedings, as well before as after the fiat. *Mason v. Polhill*, 3 Tyrw. 595.

40. Where a defendant obtains security for costs on the grounds that the plaintiff is become bankrupt, and that the action is continued by his assignees, he must undertake not to plead the bankruptcy. *Manly v. Payne*, 3 Man. & Ry. 381.

41. Non-payment of taxed costs not a preliminary objection to a motion that the taxation be reviewed. Ex parte *Richardson*, 1 Mont. & Ayr. 377.

42. When a petition has been half heard, it cannot be amended on payment merely of the costs of the day. Ex parte *Turvill*, 3 Dea. & Ch. 346.

Of Taxation.

43. A solicitor's bill was ordered to be taxed, and more than one sixth taxed off; but the master had not yet made his certificate of taxation; a petition for the costs was presented: Held, it could not be

heard until the master had made his certificate, nor unless the original petition was also set down in the paper. Ex parte *Elsee*, 2 Dea. & Ch. 332.

See AFFIDAVIT, 2. 6.—CERTIFICATE, 13. 14. 15. 16.—MOTIONS.—OFFICIAL ASSIGNER, 4. 5.—PRACTICE, 4. 17. 35.

DAMAGES

Are not either a "debt or demand" within the 3 & 4 W. 4. c. 42. s. 17. *Watson v. Abbott*, 2 Crompt. & Mee. 150.

DEBT PROVABLE.

Bond.

1. The interest to grow due on a bond cannot, together with the principal, exceed the amount of the penalty. *Hughes v. Wigram*, 1 Mylne & Keen, 24.

Partnership.

2. A partner accepts bills for a previous partnership liability, after his co-partner has committed an act of bankruptcy, and a joint commission issued: Held provable in the hands of a *bona fide* holder against the joint estate. Ex parte *Robinson*, 1 Mont. & Ayr. 18. S.C. 3 Dea. & Ch. 376, reversing ex parte *Ellis*, Mont. & Bli. 18. S.C. 2 Dea. & Ch. 555.

3. Money advanced to a trader to enable him to commence a trade, of which the lender is to share the profits, constitutes a debt provable. Ex parte *Notley*, 1 Mont. & Ayr. 46. S.C. 3 Dea. & Ch. 367.

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4. A., being a dormant partner with B., dissolves partnership, and B. is declared indebted to A. on the balance of accounts; A. sues B. for this balance, and receives a cognovit for the amount and costs. B. becomes bankrupt. Held, A. is entitled to prove against B., though some partnership debts are unpaid. *Ex parte Grazebrook*, 2 Dea. & Ch. 186.

5. If, upon the dissolution of partnership, the retiring partner assign the whole of his interest in the partnership to the continuing partner, in consideration of a certain sum being secured to him, and the continuing partner, and two persons as his sureties, severally and respectively covenant that they or some one or more of them would pay the amount by instalments, and one of the sureties take the benefit of the Insolvent Act, his discharge is a bar to an action against him on the covenant for instalments which became payable after the discharge, it being *debitum in presenti solvendum in futuro*. *Guy v. Newson*, 2 Crompton & Meeson, 142.

6. H., a money broker, was in the habit of depositing bills of exchange with B. and Co., as a security for advances, but he did not indorse them, nor were they negotiated by B. & Co., or ever presented for payment. Amongst them was one for 1,000*l.* accepted by C., who became bankrupt in March 1824, which was some time after the bill fell due; H. also became bankrupt in Dec. 1825, when B. & Co. proved the amount of the balance he owed them, excepting this bill as a security, but made no attempt to prove the bill under C.'s Commission until January 1826, when the commissioners rejected the proof. Held, that the delivery of the bill by H.

to B. and Co. must be taken to have been by way of pledge to secure the amount of the advances then due from H. to B. and Co., and not with an intention to transfer the property in it, and that the amount of those advances having been since paid, B. and Co. could not, under these circumstances, prove the bill under C.'s commission. *Ex parte Britten*, 3 Dea. & Ch. 35.

7. Proof by joint estate for alleged fraudulent abstraction by a partner, when admissible. *Ex parte Turner*, 1 Mont. & Ayr. 54, confirmed on appeal *ex parte Turner*, 1 Mont. & Ayr. 357.

8. Fauntleroy, a partner in a banking-house, transferred bank-stock, belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by Fauntleroy, who was subsequently executed for other forgeries, and a commission issued against the other partners, who were ignorant of the transaction, but with common diligence would have known of it. *Quære*, Whether the customer can prove for the value of the stock under the commission?

An action ordered to try whether the partners were indebted to the customer. *Ex parte Bolland*, 1 Mont. & Ayr. 570.

9. Fauntleroy, a partner in a banking-house, transferred bank-stock, belonging to a customer, by a forged power of attorney; the proceeds were paid to the account of the partnership, and afterwards appropriated by Fauntleroy, who was subsequently executed for other forgeries. The other partners were ignorant of the transaction, but with common diligence would have known it. Held, the customer could maintain an action against the part-

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ners for money had and received. *Keating v. Marsh*, 1 Mont. & Ayr. 582, confirmed on appeal, *Marsh and Co. v. Keating*, 1 Mont. & Ayr. 592. See *contra*, *Hume v. Bolland*, 1 Cromp. & Mee. 131, where Lord Lyndhurst, being informed of the appeal in *Marsh v. Keating*, said, "We will send our certificate to the Lord Chancellor."

Partnership Bills.

10. A. gives an accommodation Bill to B., which B. gives to C. in exchange for an accommodation bill given by C. to B. A.'s bill is provable by the assignees of C. against the estate of A., but the dividend reserved. Per Subdivision Court. Ex parte *Solarie*, 1 Mont. & Ayr. 270. S.C. 3 Dea. & Ch. 419.

11. A. discounts for K. and Co., who afterwards become bankrupt, three bills, drawn by K. and Co. on D. and S.; one of the bills becomes due before the bankruptcy and the two others afterwards, none of them are paid by the acceptors, and A. gives no notice to K. and Co. of their dishonour: Held, that A. could not prove the first bill, but might prove the two others.

K. and Co. also sent to A. five other bills drawn by them on D. and S., and received from him his acceptances for the precise amount, which they discounted with their own bankers, but none of which being paid by A. (who became bankrupt himself before they were due) they were proved by the holders under K. and Co.'s commission, A. having never negotiated the five bills sent him by K. and Co.: Held, that the assignees could not prove them under K. and Co.'s commission. Ex parte *Solarie*, 2 Dea. & Ch. 261. See this case commented on

in ex parte *Johnson*, 1 Mont. & Ayr. 622. S.C. 3 Dea. & Ch. 437.

12. Where part of the account between two mercantile houses, which became bankrupt, consists of outstanding bills that may be proved against the estates by third parties, as holders, there can be no proof in respect of those bills, as between the two houses, unless there is a surplus after satisfying the holders. Ex parte *Laforest*, 2 Dea. & Ch. 199. S.C. Mont. & Bli. 963.

13. Notice of the dishonour of a bill must be sent to the house of a bankrupt indorser, though he be not there, or the amount cannot be proved against his estate. The holder must use due diligence to give notice; the effect of such diligence is another thing. Notice must be given to the messenger, if in possession.

Quere, as to the necessity of giving notice to the assignees? Ex parte *Johnston*, 1 Mont. & Ayr. 622. S.C. 3 Dea. & Ch. 433.

Partnership, Foreign Commission.

14. A firm abroad drew bills on one of its own partners trading on his own account in England, payable to an agent of the foreign government. The bills were not paid. Process of insolvency issued against the foreign firm, and a commission against the English partner. Held, the agent may prove under the commission, but will be restrained from receiving dividends, unless he elect not to prove under the insolvency abroad. Ex parte *Chevalier*, 1 Mont. & Ayr. 345, confirming ex parte *Turner*, Mont. & Bli. 90.

Marriage Settlements.

15. A trader on his marriage gave a bond to trustees, to pay them

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1,200*l.* upon trust for himself for life, if he should not become a bankrupt, with remainder for his wife for life, with the usual limitations to children. He received his wife's marriage portion of 150*l.* Held, the trustees were entitled to prove for 1,200*l.*, the dividends to be invested in stock, the interest of which, equal to the interest on 150*l.*, to be paid to the wife, and the remainder to the bankrupt's creditors for his life, and after his death upon the trusts of the bond. *Ex parte Shute*, 3 Dea. & Ch. 1. S. C. Mont. & Bli. 385.

16. Where trustees under marriage settlement lend the wife's money to her husband with her consent, and he become bankrupt, they cannot, on behalf of wife, prove for interest, but only for the principal, she having been supported by husband since marriage. *Semble secus*, if they had proved to save themselves from consequences of their own act, if her consent had not been given. *Ex parte Green*, 2 Dea. & Ch. 113.

17. A bankrupt gave a bond to trustees for the payment of 5,000*l.*, as a provision for his daughter on her marriage. Parol evidence is not admissible to prove that when the bond was given it was understood that it was only to be available in the event of the success of a certain speculation, which failed. *Ex parte Morley*, 2 Dea. & Ch. 51.

18. The two trustees under the marriage settlement of H. advance him, on the security of his bond, the amount of the trust fund (which was his wife's fortune) for the purpose of being employed in his business, and one of the trustees afterwards enters into a parol agreement with H. and his partner, that the loan should be considered a debt

due from the partnership: Held, that this subsequent agreement was in the nature of a collateral security, and that the trustees could prove both against the joint estate, and the separate estate of H., making their election afterwards from which estate they would receive dividends. *Ex parte Kedie*, 2 Dea. & Ch. 321.

Contingent.

19. Where the contingency on which the payment of a debt depends happens before the declaration of a final dividend, and before the bankrupt has obtained his certificate, the creditor may and is bound under the latter branch of the 56th section to come in and prove his debt, though at the date of the commission the debt was incapable of valuation. Per Chief Judge. *Ex parte Simpson*, 1 Mont. & Ayr. 563.

20. The second part of section 56 of 6 Geo. 4. c. 16. is not confined to cases which might have been brought within the first part. Per Chief Judge. *Ex parte Simpson*, 1 Mont. & Ayr. 563.

21. A liability incapable of valuation at the time of the bankruptcy is not provable; as where the contingency is, whether the original debtor would not himself pay, and whether the bankrupt would ever be called upon to pay. *Clements v. Langley*, 2 Nev. & Man. 277. S. C. 5 Barn. & Adol. 372.

22. If a surety covenant to pay an annuity, not in all events, but only when the grantor make default, and the grantor give a warrant of attorney for a gross sum, upon which judgment is entered up, and the surety become bankrupt after default is made, the value of the annuity is not provable as a

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contingent debt. *Johnson v. Crompton*, 4 Sim. 46.

23. Where the bankrupt has given an indemnity bond, and the amount of damage is not ascertained when the fiat issues, there is no debt provable. *Ex parte Marshall*, 1 Mont. & Ayr. 118 and 145. S. C. 3 Dea. & Ch. 120. *See Appendix*, 1 Mont. & Ayr., for a note on this case. *In ex parte Marshall*, Mont. & Bli. 242. S. C. 2 Dea. & Ch. 589, a claim had been allowed to be entered.

24. If the bankrupt be a co-surety for a debt, and no default be made by the principal before the bankruptcy, and a co-surety be compelled to pay the debt after the bankruptcy, the contributive share due from the bankrupt is not provable as a contingent debt. *Clements v. Langley*, 2 Nev. & Man. 277.

25. On a dissolution of partnership between Guy and Long, the former assigned the partnership debts to Long, Avon, and Newson, in consideration of a sum. All three covenanted severally and respectively with Long to pay. Held, this was an absolute engagement by Newson, and not a mere undertaking to pay if Long did not. *Guy v. Newson*, 4 Tyrw. 31.

26. A covenant to secure an annuity on property, to which the grantor might become entitled by will on the death of A., is not a contingency capable of valuation. *Lyde v. Mynn*, 1 Mylne & Keen, 683.

27. Damages are not either a "debt or demand" within the 3 & 4 W. 4. c. 42. s. 17. *Watson v. Abbott*, 2 Crompt. & Mee. 150.

28. If a record be withdrawn on the terms of the plaintiff paying the defendant his costs as between attorney and client, which are taxed, but not paid, and after the bank-

ruptcy of the plaintiff judgment as in case of nonsuit be signed, the costs are not provable. *Jones v. Sewell*, 4 Tyrw. 662, in note.

29. A bond is provable given by a bankrupt in consideration of his wife's fortune, that he, his heirs, &c. would within three months from the marriage, on receiving notice from the trustees, pay them 1,000*l.*, to be held on the trusts of the marriage settlement, though no notice was given before the bankruptcy. *Ex parte Hooper*, 1 Mont. & Ayr. 395.

Annuity.

30. If an annuity be granted in consideration of relinquishing a business, the grantee is to prove for the market value, as before the 6 Geo. 4. c. 16., and not with reference to the original consideration under section 54 of that act, which is confined to money consideration alone. *Ex parte Saxe*, 2 Dea. & Ch. 172. S. C. Mont. & Bli. 172.

Surety.

31. If a surety covenant to pay an annuity, not in all events, but only when the grantor makes default, and he and the grantor give a warrant of attorney for a gross sum upon which judgment is entered up, and the surety become bankrupt after default is made, the value of the annuity is not provable as an annuity debt. *Johnson v. Crompton*, 4 Sim. 46.

32. A. covenants with an annuitant to pay an annuity on default of B. A. becomes bankrupt before any default. The annuitant cannot prove against A.'s estate, the latter not having contracted a debt until the default made, either under the 54th or 56th clauses of 6 Geo. 4.

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Ex parte *Thompson*, 2 Dea. & Ch. 126. S. C. Mont. & Bli. 219.

33. If the bankrupt and others be co-sureties for a debt, and no default be made by the principal before the bankruptcy, and a co-surety be compelled to pay the debt after the bankruptcy, the contributive share due from the bankrupt is not a debt provable under section 52 of 6 Geo. 4. c. 16. *Clements v. Langley*, 2 Nev. & Man. 269.

Guarantee.

34. Lyne and Co. were the agents of Henry Sudell. A party accepted bills under the following document given by Henry Sudell: "In consequence of your allowing Messrs. Lyne to draw on you to the extent of 12,000*l.*, I hereby guarantee to you that amount, it being understood that payment of these drafts is to be provided for by myself or Messrs. Lyne in direct discountable bills, fourteen days at least before they fall due, &c." Messrs. Lyne accordingly drew bills which the party accepted. Henry Sudell became bankrupt before some of the bills became due. Held, there was a debt provable, the document being, not a guarantee, but an original undertaking.

Semble, It would have been provable if a mere guarantee. Ex parte *Simpson*, 1 Mont. & Ayr. 541, confirming ex parte *Myers*, Mont. & Bli. 229. S. C. 2 Dea. & Ch. 251.

35. On a dissolution of partnership between Guy and Long, the partners assigned the partnership debts to Long, Avon, and Newson, in consideration of a sum, which all three severally and respectively with Long agree to pay. Held, an absolute engagement by Newson, and not an engagement to pay if Long did not. *Guy v. Newson*, 4 Tyrw. 31.

36. C. and Co. guarantee to A. payment of 300*l.* for the erection of a mill for D., on the production of a certificate that the mill was built according to a specification. A. produces a certificate, stating a deviation from the original plan, with the consent of D., upon which C. and Co., without making any objection to such deviation, inform A. it was not in their power to pay the money. Held, that A. might prove under the fiat against C. and Co. Ex parte *Ashwell*, 2 Dea. & Ch. 281.

37. Where a guarantee becomes absolute before the bankruptcy, and capable of valuation, it is provable. Per Sir G. Rose. Ex parte *Simpson*, 1 Mont. & Ayr. 567.

38. All guarantees are not provable. Per Sir G. Rose. Ex parte *Simpson*, 1 Mont. & Ayr. 569.

39. The meaning of the word "guarantee," when used in any writing, is to be collected from the nature of the instrument, &c. Per Sir G. Rose. Ex parte *Simpson*, 1 Mont. & Ayr. 567.

40. So far as guarantees are concerned, a debt provable and a petitioning creditor's debt are convertible terms. Per Sir G. Rose. Ex parte *Simpson*, 1 Mont. & Ayr. 567.

Wages.

41. Where the bankruptcy of the master, after the hiring for a year, happens during the year, the demand for wages is not provable. *Thomas v. Williams*, 3 Nev. & Man. 545.

DEPOSITIONS.

Bankrupt petitioning to reverse the adjudication under section 17 of 1 & 2 W. 4. c. 56. entitled to copies of the depositions. Ex parte *Belcher*, 2 Dea. & Ch. 601.

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DISSOLUTION OF PARTNERSHIP.

In cases of mines bankruptcy is not, as in other cases, a dissolution of the peculiar partnership which exists. Per Chief Judge. Ex parte *Broadbent*, 1 Mont. & Ayr. 638.

DISTRESS.

An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds of the sale. Ex parte *Cocks*, 3 Dea. & Ch. 8.

See ASSIGNEES, 5.

DIVIDEND.

1. On proof by bankrupt executor against his own estate, dividends paid into hands of the accountant general. Ex parte *Colman*, 2 Dea. & Ch. 584.

2. When the omission to prove proceeds from a creditor's own laches, the Court will not order a dividend to be stayed until his petition to prove can be heard. Ex parte *Brees*, 3 Dea. & Ch. 283.

3. After a proof by A. as holder of a bill of exchange, B. paid it for the honour of the drawer, which was unknown to the assignees until several dividends had been paid to A.'s representatives. Quære, Whether the Court had jurisdiction to order the dividends to be refunded. Ex parte *Greenwood*, 3 Dea. & Ch. 598. S. C. 1 Mont. & Ayr. 65.

4. Where a creditor writes to assignees to pay "the dividends to A. B." they are justified in paying subsequent dividends to A. B. until they have notice that A. B.'s authority is revoked. Ex parte *Bright*, 2 Dea. & Ch. 8.

5. That a creditor proving, has property belonging to the estate in his possession, is a ground to restrain the payment of dividends. Ex parte *Dobson*, 1 Mont. & Ayr. 666.

See DEBT PROVABLE, 14. 18.—
PARTNERSHIP, 5.

DOCKET PAPERS.

A. tendered docket papers, of which the affidavit of debt was sworn before the solicitor to the petitioning creditor; at the same time B. tendered papers not so sworn; they drew lots, and the lot fell to A., whose papers were entered. The Court refused to interfere to give the fiat to B. Ex parte *Dakins*, 1 Mont. & Ayr. 417.

DOUBLE PROOF.

See CONSOLIDATION, 3.—PROOF, 2. 19.

ENLARGING TIME FOR OPENING FIAT.

See FIAT.

EQUITABLE MORTGAGES.

1. M. and Co. deposited with S. and Co. the mortgage deeds of colonial property, and afterwards executed an assignment of the mortgage deed, but without making any actual assignment of the mortgage itself, or of the mortgaged property: Held, that S. and Co. were the equitable mortgagees of the mortgaged property, and not merely assignees of the mortgage debt. Ex parte *Smith*, 2 Dea. & Ch. 271.

2. Slaves in Antigua are real property, and may be equitably mort-

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gaged by depositing a deed containing a schedule of their names, &c. though the registered memorandum of this deposit contain no list of slaves. Ex parte *Rucker*, 1 Mont. & Ayr. 481.

3. The bankrupt, being indebted to the petitioners as the acceptors of two bills of exchange, entered into an agreement with the petitioners and W. L., that the bills should be paid out of the proceeds of certain property, the deeds of which were then in the hands of W. L. for sale: Held, that the petitioners might claim as equitable mortgagees of that property, subject to any prior lien of W. L. Ex parte *Greenhill*, 3 Dea. & Ch. 334.

4. A bankrupt, while in partnership with K., deposits a lease with a creditor, and the partnership is afterwards dissolved, when certain arrangements are made between the bankrupt and the solvent partner: Held, such arrangements could not affect the rights of the creditor. Ex parte *Booth*, 2 Dea. & Ch. 59.

5. A mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption: Held, that the equitable mortgagee was entitled to a sale of the equity of redemption, if it be rejected by the assignees. Ex parte *Tuffnell*, 1 Mont. & Ayr. 620.

6. Where an equitable mortgage is made by deposit of deeds, accompanied by a memorandum, and the debt subsequently discharged, and a fresh debt contracted, when it is verbally agreed that the deposit shall continue as a security for the latter debt, the mortgagee is not entitled to the costs of his petition out of the proceeds of the sale. Ex parte *Pigeon*, 2 Dea. & Ch. 118.

7. The Court will not interfere between two adverse claimants; one

claiming as equitable mortgagee, the other under a prior lease. Ex parte *Royds*, 3 Dea. & Ch. 294.

8. An equitable mortgagee will not be preferred to a subsequent legal mortgagee without notice. The onus lies on the former to prove the latter had notice. Ex parte *Hardy*, 2 Dea. & Ch. 393.

9. Quære, Whether an equitable mortgagee be entitled to the growing crops and rents from the time of presenting his petition, or from the date of the order of sale? In this case the petitioner consented to take an order for the latter. Ex parte *Bignold*, 2 Dea. & Ch. 391.

10. Quære, Who is entitled to the mesne profits between the sale and the date of the order? Per Sir G. Rose. Ex parte *Bulcher*, 2 Dea. & Ch. 589.

11. When mortgages are sold under the order of the commissioners, it is the assignees who sell. Per Sir G. Rose. Ex parte *Ashley*, 1 Mont. & Ayr. 86.

12. Where an equitable mortgagee is also assignee, a solicitor will be appointed to conduct the sale. Ex parte *Lees*, 2 Dea. & Ch. 360.

13. Although an equitable mortgagee waive his privilege to bid, yet the assignees must still have the conduct of the sale. Ex parte *Smith*, 2 Dea. & Ch. 60.

14. The Court will not postpone the sale of premises equitably mortgaged on the application of the assignees, the equitable mortgagee opposing. Ex parte *Belcher*, 2 Dea. & Ch. 587.

15. If after an order for sale of premises equitably mortgaged the assignees delay the sale, an application should be made to enforce the order, and not for a new order.

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Ex parte *Robinson*, 3 Dea. & Ch. 108.

16. The assignees bought in premises sold under the usual order in case of equitable mortgages; the mortgagee applied to the commissioners for a second sale, which, however, was not then made; subsequently the assignees obtained another order for a sale, at which the premises were sold at a loss: Held, the assignees were not liable for the difference, but the ground-rent and expences since the first sale were paid out of the estate. Ex parte *Baldock*, 2 Dea. & Ch. 60.

17. The Court will not rescind a purchase by the mortgagee because he bid without leave. Ex parte *Ashley*, 1 Mont. & Ayr. 82.

18. A mortgagee, with a power of sale, himself put up the premises for sale, and then applied for leave to bid: Held, he could not be permitted unless he waived the power, and had the property sold under the order of the commissioners. Ex parte *Davis*, 1 Mont. & Ayr. 89.

19. A mortgagee having bid without leave, an order to bid *nunc pro tunc* was made. Ex parte *Pedder*, 1 Mont. & Ayr. 327.

20. The Court will not exempt a mortgagee who bids from paying a deposit. Ex parte *Tatham*, 1 Mont. & Ayr. 335.

21. The petition of an equitable mortgagee must be served on the assignees; service on the solicitor to the commission is not sufficient. Ex parte *Cooks*, 3 Dea. & Ch. 24.

22. In a pledge of goods the depositary can have no right which the party pledging did not possess. Per Chief Judge. Ex parte *Britten*, 8 Dea. & Ch. 48.

23. An equitable mortgagee of leasehold property must satisfy a distress for rent out of the proceeds

of the sale. Ex parte *Cooks*, 3 Dea. & Ch. 8.

24. A coal mine was worked by several persons under a lease, the articles of partnership giving each a power of pre-emption in case any partner wished to dispose of his share. A partner deposited an attested copy of the lease, in order to give an equitable mortgage on his share to a stranger. Held, the Court could not make the usual order for sale, &c., as the partnership accounts must first be taken, which this Court has no jurisdiction to do; and the case was not free from doubt. Cross, J., dissenting. Ex parte *Broadbent*, 1 Mont. & Ayr. 635.

See ASSIGNEES, 24. 25.

ESTATE TAIL.

1. The common bargain sale to assignees passes an estate tail of which the bankrupt was possessed. Per Chief Judge. Ex parte *Somerville*, 1 Mont. & Ayr. 415.

2. Quære, Whether the commissioners can convey an estate tail after the death of the bankrupt? They would not do wrong in executing a conveyance to enable the question to be tried. Ex parte *Somerville*, 1 Mont. & Ayr. 408.

EVIDENCE.

1. On a petition to reverse the adjudication under section 17 of 1 & 2 W. 4. c. 56. the bankrupt is entitled to copies of the depositions. Ex parte *Jackson*, 2 Dea. & Ch. 601. S. C. Mont. & Bli. 391.

2. On a petition to reverse the adjudication under section 17 of 1 & 2 W. 4. c. 56. the assignees may adduce new evidence in support of

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the requisites. Ex parte *Jackson*, 2 Dea. & Ch. 601. S. C. Mont. & Bli. 394.

3. An assignee, who was also a mortgagee, purchased the mortgaged estate without leave. The examination of the assignee before the commissioner as to the sale of the property was read as evidence of the assignee's misconduct. Ex parte *Turville*, 3 Dea. & Ch. 346.

4. On a charge of usury the bankrupt's affidavit in support of the respondent's case is admissible, though he have previously made one in support of the petition; but, when the party is dead who could have best answered such affidavit, the bankrupt's allegations, uncorroborated, will not go for much. Ex parte *Gwyn*, 2 Dea. & Ch. 12.

5. On a petition by assignees to supersede, the bankrupt's affidavit is admissible to show that the commission was fraudulently concerted. Ex parte *Bellwood*, 2 Dea. & Ch. 37.

6. The bankrupt's examination cannot be read as evidence against a third party who had no power of cross-examining him. Ex parte *Armsby*, 2 Dea. & Ch. 212.

7. A creditor of the bankrupt cannot give evidence *visà voce* as to the requisites to support the fiat. Ex parte *Lavender*, 1 Mont. & Ayr. 702.

8. Depositions enrolled by the assignees are not evidence against them to invalidate the commission. *Chambers v. Bernasconi*, 4 Tyr. 531.

9. If, in a case within the 92d section of 6 Geo. 4. c. 16., the assignees upon a trial go into evidence of trading in consequence of a notice to dispute, without relying upon the depositions, or advertising to the 92d section, 6 Geo. 4. c. 16., and fail to establish the trading, and are nonsuited, the Court will not set the

nonsuit aside. *Johnson v. Piper*, 2 Nev. & Man. 672.

10. A written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time, and immediately sent to the sheriff's office, and there filed in the course of business, is not admissible as evidence of the place at which the arrest took place in an action to dispute the commission. *Chambers v. Bernasconi*, 4 Tyr. 531.

11. It has been ruled that the bankrupt's statement on his balance sheet that he owes 30,000*l.*, and that he cannot pay one shilling in the pound, is admissible evidence to show his circumstances, when a *fi. fa.* issued against his goods. *Botcherley v. Lancaster*, 3 Nev. & Man. 383.

12. A bankrupt gave a bond to trustees for the payment of 5,000*l.* as a provision for his daughter on her marriage: parol evidence is not admissible to prove, that when the bond was given it was understood that it was only to be available in the event of the success of a certain speculation which had failed. Ex parte *Morley*, 2 Dea. & Ch. 51.

13. If, on cross-examining a witness, an irrelevant question be put, evidence cannot be produced to disprove his answer; it must be taken for better and worse. Ex parte *Armsby*, 2 Dea. & Ch. 213. See S. P. *Harris v. Tippet*, 2 Camp. 637.

See VIVA VOCE EXAMINATION.

EXAMINATION OF BANKRUPT.

See COMMISSIONERS, 1. 2. 3.

EXCEPTIONS TO REPORT.

On hearing exceptions to the master's report, those only of the

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affidavits can be read which, being filed on the original petition, were used before the master. Ex parte *Grylls*, 2 Dea. & Ch. 290.

See PRACTICE, 11. 12. 13.

EXECUTOR.

1. In order to fix the executor of the petitioning creditor with costs, the petition must pray costs against him in his character of executor. Ex parte *Harwood*, 3 Dea. & Ch. 261.

2. Quære, Whether the Court have jurisdiction over the executor of an assignee to carry into effect further directions on an order made on the assignee? Ex parte *Turville*, 1 Mont. & Ayr. 686.

Bankruptcy of.

3. A testator's property is liable only to the extent to which he has directed it to be embarked in the trade; only so much passes to the assignees under a fiat against his executor. *Thompson v. Andrews*, 1 Mylne & Keen, 116.

4. A creditor of a testator or intestate has no right to prove against the estate of the bankrupt executor or administrator. *Searle v. Bradshaw*, 4 Tyr. 69.

5. Where an administrator, who is under terms to plead issuably, pleads inconsistent pleas, viz. plene administravit and bankruptcy, the plaintiff may sign judgment as for want of a plea. *Searle v. Bradshaw*, 4 Tyr. 69.

6. Bankrupt executor allowed to prove against his own estate; dividends to be paid into the hands of the accountant-general. Ex parte *Colman*, 2 Dea. & Ch. 584.

7. In order to fix the executor of the petitioning creditor with costs,

the petition must pray costs against him in his character of executor. Ex parte *Harwood*, 3 Dea. & Ch. 252.

See SERVICE, 2.

EXHIBITS.

Where exhibits are referred to in an affidavit, it does not give the other side an absolute right to their production; it is a matter for the discretion of the Court. Ex parte *Armsby*, 2 Dea. & Ch. 192.

EXPUNGING PROOF.

On an unsuccessful application to the commissioner to expunge a debt under 6 Geo. 4. c. 16. s. 60. the applicant may be ordered to pay the commissioner's and solicitor's fees, and sums for the use of the room, &c. Ex parte *Kirkaldy*, 1 Mont. & Ayr. 642.

FIAT.

Amending.

1. Docket papers and the fiat cannot be amended by inserting the bankrupt's place of business.

Quære, If the docket be correct, and the fiat incorrect through the error of the office?

Ex parte *Graves*, 1 Mont. & Ayr. 315.

2. Unopened fiat amended to agree with docket papers. Ex parte *Jervis*, 1 Mont. & Ayr. 619.

3. An unopened fiat amended by inserting a new date, so as to give effect to a subsequent act of bankruptcy. Re *Roberts*, 3 Dea. & Ch. 315.

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4. Unopened fiat amended by altering name of parish. Ex parte *Elliot*, 1 Mont. & Ayr. 664.

5. Unopened fiat not amended. Ex parte *Hawes*, 1 Mont. & Ayr. 708.

6. Semble, That the name of one of the commissioners who has not acted under the fiat being mis-spelt is not such an error as to require amendment. Re *Bell*, 3 Dea. & Ch. 326.

Country.

7. In country fiats there must be inserted the names of two barristers. Ex parte *Kilsby*, 3 Dea. & Ch. 19.

8. A country fiat preferred to a London one, when the major part of the creditors, and the witnesses to prove the requisites, and one of the bankrupts, resided in the country. Ex parte *Bolan*, 2 Dea. & Ch. 331.

9. "That the major part in number of the creditors reside at B., and it would be a great saving to the estate," is not sufficient reason to order a country fiat, when the bankrupt traded in London. Ex parte *Leonard*, 2 Dea. & Ch. 182.

Renewed.

10. A renewed fiat can only be issued by a creditor whose debt is sufficient to support an original fiat. Ex parte *Maude*, 1 Mont. & Ayr. 46. S. C. 3 Dea. & Ch. 365.

Auxiliary.

11. An auxiliary fiat granted to examine witnesses in London, the original fiat being worked at Portsmouth. Ex parte *Cartér*, 3 Dea. & Ch. 106.

Enlarging Time for opening.

12. On an application for enlarging the time for opening a fiat,

an affidavit must be made that the party *bond fide* intends to prosecute the fiat, that there is no composition deed pending or intended, and no connivance with the bankrupt. Ex parte *Smith*, 1 Mont. & Ayr. 473.

13. Time for opening fiat will not be enlarged to give effect to an arrangement of composition. Re *Moody*, 2 Dea. & Ch. 210. S. C. differently reported, Mont. & Bli. 512.

General.

14. A new fiat issued on the application of the petitioning creditor to give effect to a more recent act of bankruptcy, the time for opening the first fiat not having expired. Re *Crawley*, 3 Dea. & Ch. 251.

15. A joint fiat issued against two partners; then commissioners were appointed in pursuance of 1 & 2 W. 4. c. 56. s. 14.: a separate fiat against a third partner cannot be directed to the old commissioners. Ex parte *Beague*, 1 Mont. & Ayr. 445.

16. If the fiat be lost, a new one must be issued. Re *Levet*, 1 Mont. and Ayr. 309.

See DOCKET PAPERS.

FIXTURES.

The assignees are entitled to trade fixtures. Ex parte *Lloyd*, 1 Mont. & Ayr. 503.

See REPUTED OWNERSHIP, 5. to 12.

FOREIGN COMMISSION.

A., trading in London on his separate account, and at Brazil in partnership with B. and C. under the firm of A. and Co., becomes insol-

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vent, when four of his creditors are appointed inspectors of his estates, who, it was agreed, should receive the several consignments and remittances expected from the Brazil house, as trustees for the persons to whom the same might be ultimately found to belong; the Brazil house, ignorant of A.'s insolvency, make various consignments to A., directing him to sell them at certain places abroad, and to place the proceeds to the account of the Brazilian house; these goods are accordingly sold under the direction of the inspectors, and the proceeds received by them; at the time of A.'s insolvency he was under acceptances to the Brazilian house to a larger amount than the value of the consignments, but such acceptances were on a general account, and not on the account of any particular consignment from the foreign house; A. afterwards became bankrupt, and a cession of the effects of the Brazilian house was also made to assignees according to the laws of Brazil: Held, that the assignees of the Brazilian house, and not the assignees of A. in England, were entitled to the proceeds of these goods. *Ex parte Wacherer*, 2 Dea. & Ch. 27.

FORMA PAUPERIS.

A libellous handbill, published by the bankrupt against the assignees and the solicitor to the commission, is not a sufficient ground for discharging an order which allowed the bankrupt to petition in *forma pauperis*. *Ex parte Morland*, 3 Dea. & Ch. 248.

FRAUD, DEBTS PROVABLE THROUGH.

See DEBTS PROVABLE, 7. 8. 9.

FRAUDULENT PREFERENCE.

See PREFERENCE, FRAUDULENT.

FREIGHT.

See REPUTED OWNERSHIP, 26.

GAZETTE.

See STAYING ADVERTISEMENT, &c.

HABEAS CORPUS.

1. On a return of a habeas corpus, affidavits may be read to show facts not apparent on the face of the warrant. Per Lord Chancellor. *Ex parte Bardwell*, 1 Mont. & Ayr. 249.

2. On habeas corpus the party may object that a question was illegal, though he did not object before the commissioners. *Ex parte Bardwell*, 1 Mont. & Ayr. 207.

3. A prisoner regularly committed by a commissioner to the messenger, and subsequently irregularly committed by the subdivision court, is not, on a discharge under habeas corpus, remanded to the custody of the messenger. *Ex parte Bardwell*, 1 Mont. & Ayr. 214.

4. If a party, discharged by the Lord Chancellor from a commitment by commissioners on habeas corpus, be arrested for debt on his way home, it is a great contempt, and every person concerned may be

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committed. Per Lord Chancellor. Ex parte *Lampon*, 1 Mont. & Ayr. 256.

5. On a discharge under the Habeas Corpus Act the prisoner's costs paid by the assignees, the estate being sufficient to recoup them. Ex parte *Bardwell*, 1 Mont. & Ayr. 193. But see *Turner v. Hibbert*, 1 Mont. & Ayr. 243.

HEARING OF PETITION.

See PRACTICE.

INDICTMENT.

An indictment against the bankrupt and others, for conspiracy to conceal part of his estate, must state the requisites to support the commission. *Rex v. Jones*, 4 Barn. & Adol. 346. S. C. 1 Neville & Manning, 81.

INJUNCTION.

Where there are cross acceptances, and the right of set-off is clear, the Court will restrain the assignees from bringing an action. Ex parte *Clegg*, 1 Mont. & Ayr. 91.

See JURISDICTION OF THE COURT OF REVIEW, 3. 7. 23. to 27.

IMPERTINENCE.

Affidavits will not be referred for impertinence till after hearing of the petition. Ex parte *Arnsby*, 2 Dea. & Ch. 119. S. C. Mont. & Bli. 267.

INROLMENT.

The Court have a general power to order the proceedings to be entered of record. Ex parte *Thomas*, 3 Dea. & Ch. 292.

INSOLVENCY.

A man must be taken to be insolvent who is not able to meet his engagements. Per Sir G. Rose. Ex parte *Pearse*, 2 Dea. & Ch. 455.

ISSUES.

The Court are reluctant to grant an issue on the application of the assignees. Per Chief Judge. Ex parte *Patrick*, 1 Mont. & Ayr. 391.

INSPECTOR.

The interest of the joint creditors appearing *primâ facie* to be adverse to that of the separate creditors, the Court appointed an inspector to protect the interests of the latter. Ex parte *Dawson*, 3 Dea. & Ch. 12.

INTEREST.

1. The interest to grow due on a bond cannot, together with a principal, exceed the amount of the penalty. *Hughes v. Wynne*, 1 Mylne & Keen, 24.

2. Where trustees under marriage settlement lend the wife's money to her husband with her consent, and he become bankrupt, they cannot, on behalf of wife, prove for interest, but only for the principal, she having been supported by husband

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since marriage. *Semble secus*, if they had proved to save themselves from consequences of their own act if her consent had not been given. Ex parte *Green*, 2 Dea. & Ch. 118.

JOINT ESTATE.

The orders of the Court touching the administration of joint estates are founded on an equitable power possessed or assumed by the Court. Per Sir G. Rose. Ex parte *Lomas*, 1 Mont. & Ayr. 531.

JUDGMENTS.

An execution on a judgment on a *warrant* of attorney is not protected by 1 W. 4. c. 56. sect. 7., but is within the 108th section of 6 Geo. 4. c. 16. *Crossfield v. Stanley*, 1 Neville & Manning, 669. S. C. 4 Barn. & Adol. 87.

JURISDICTION OF THE LORD CHANCELLOR.

1. The Lord Chancellor is placed at the head of the jurisdiction in bankruptcy to bring in his authority as Lord Chancellor. *Dicas v. Lord Brougham*, 6 Carr. & Payne, 250.

2. The Chancellor may commit for a contempt in bankruptcy. *Dicas v. Lord Brougham*, 6 Carr. & Payne, 351.

3. An action does not lie against the Chancellor for a commitment upon an erroneous judgment pronounced by him sitting in bankruptcy. *Dicas v. Lord Brougham*, 6 Carr. & Payne, 369.

4. In cases of supersedeas the Great Seal has still a substantive power, independent of that on appeal. Ex parte *Keys*, 1 Mont. & Ayr. 226. S. C. 3 Dea. & Ch. 263.

5. Where there are not the requisites to support a fiat, the Lord Chancellor will recommend to the commissioners to hear counsel against the adjudication, and, if the bankruptcy be found, will stay the insertion of the advertisement in the Gazette, and finally supersede. Ex parte *Nokes*, 1 Mont. & Ayr. 461.

6. If a bill filed by assignees be dismissed with costs, the Lord Chancellor has no jurisdiction to order the costs to be retained by the assignees out of the bankrupt's estates. *Turner v. Hibbert*, 1 Mont. & Ayr. 243.

JURISDICTION OF THE COURT OF REVIEW.

1. The jurisdiction is not more extensive than that of the Great Seal when sitting in bankruptcy before the institution of this Court. Ex parte *Holder*, 1 Mont. & Ayr. 520.

2. The Court has jurisdiction over the estate, but none to bring property within the estate. Per Sir G. Rose. Ex parte *Holder*, 1 Mont. & Ayr. 523.

3. The Court of Review will stay the insertion of the advertisement in the Gazette. Ex parte *Lavender*, 1 Mont. & Ayr. 699.

4. The Court can reverse the decision of a subdivision court on a matter of fact as to *expunging* a proof, that not being within section 30 of 1 & 2 W. 4. c. 56. Ex parte *Baldwin*, 1 Mont. & Ayr. 615.

5. The Court has jurisdiction to revise an allowance made by the

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commissioner to an official assignee, but it seems will only exercise it in extreme cases. In this case interference refused. *Cross, J.*, dissentiente. *Ex parte Tiplady*, 1 Mont. & Ayr. 162.

6. The Court will not order a sale by private contract, the commissioners having power so to do. *Ex parte Ladbroke*, 1 Mont. & Ayr. 384.

7. The Court has a controlling power over the appointment of an official assignee by the commissioner. *Ex parte Bramston*, 2 Dea. & Ch. 375.

8. *Quære*, Can the Court of Review entertain a petition of appeal from the rejection by the commissioners of a proof of debt on a question of fact? *Ex parte Turner*, 1 Mont. & Ayr. 268.

9. From the peculiar jurisdiction which courts have over their own officers, they will, upon the mere suggestion of improper or irregular conduct, call them to account. *Per Sir G. Rose. Ex parte Carter*, 2 Dea. & Ch. 629.

10. The Court will exercise summary jurisdiction over a solicitor for acts done as an officer of Court only. *Ex parte Bull*, 3 Dea. & Ch. 116.

11. A petition that three attorneys should pay to the assignees money received by the former as the bankrupt's solicitors under an order in Chancery, dismissed, as one of the three was not an attorney of this Court. *Quære*, Whether such order would have been made if all three had been solicitors of the Court? *Semble*, not. *Ex parte Hicks*, 2 Dea. & Ch. 573.

12. The Court can order the assignees to deliver up property alleged to have been in the reputed ownership of the bankrupt. *Ex*

parte Moldant, 3 Dea. & Ch. 351; and see *ex parte Wiggins*, Mont. & Bli. 168. S.C. 2 Dea. & Ch. 269, and constant practice.

13. The Court has no jurisdiction to order property, alleged to have been given as a fraudulent preference to be delivered up because the party has claimed. *Ex parte Dobson*, 1 Mont. & Ayr. 666.

14. The Court will not compel the official assignee to join the other assignees in a suit. If he improperly refuse to join, and is made defendant, he may have to pay his own costs. *Ex parte Evans*, 1 Mont. & Ayr. 335.

15. The Court will not order the messenger to withdraw from possession of goods alleged to have been in the reputed ownership of the bankrupt. *Ex parte Harling*, 2 Dea. & Ch. 389. But the Court would so interfere as against the assignees. *Ex parte Wiggins*, Mont. & Bli. 389.

16. When a trustee becomes bankrupt, the Court can appoint a new one, without a reference to the master. *Ex parte Buffery*, 2 Dea. & Ch. 576.

17. The Court will not take a trust-deed out of the possession of the bankrupt's trustees. *Ex parte Holder*, 3 Dea. & Ch. 276.

18. *Quære*, Whether the Court have jurisdiction over the executor of an assignee to carry into effect further directions on an order made on the assignee? *Ex parte Turville*, 1 Mont. & Ayr. 686.

19. In many cases it has been decided that the Court has no power to bind the executors of assignees to contracts. *Per Sir G. Rose. Ex parte Lucas*, 1 Mont. & Ayr. 97.

20. If the intended lessor and lessee both become bankrupt, and the assignees agree to take a lease,

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semble the Court have not jurisdiction to enforce specific performance. In this case the Court refused to interfere. *Ex parte Lucas*, 1 Mont. & Ayr. 93.

21. After a proof by A. as holder of a bill of exchange, B. paid it for the honour of the drawer, which was unknown to the assignees until several dividends had been paid to A.'s representatives. *Quære*, Whether the Court had jurisdiction to order the dividends to be refunded? *Ex parte Greenwood*, 1 Mont. & Ayr. 65. S. C. 3 Dea. & Ch. 398.

22. A stranger to the commission obtained an assignment of the creditor's proofs, and therewith bought part of bankrupt's estate from the assignees: Held, the Court had no jurisdiction to set aside the purchase, Cross, J., dissenting. *Ex parte Holder*, 1 Mont. & Ayr. 518.

23. The Court can stay an action brought by the bankrupt in any Court. Per Sir G. Rose. *Ex parte Davy*, 1 Mont. & Ayr. 290.

24. The Court have jurisdiction to restrain the bankrupt from bringing actions to upset his commission. *Ex parte Davy*, 1 Mont. & Ayr. 283.

25. The Court would not restrain an action in which the bankrupt intended fairly to try the validity of the commission. Per Sir G. Rose. *Ex parte Davy*, 1 Mont. & Ayr. 299.

26. After twenty-two years, and acquiescence, the Court will restrain the bankrupt from bringing actions against purchasers under the commission. *Ex parte Davy*, 1 Mont. & Ayr. 283.

27. Long acquiescence is enough to refuse to supersede on the application of the bankrupt, but not alone enough to enable the Court to restrain him from bringing ac-

tions. Per Chief Judge. *Ex parte Davy*, 1 Mont. & Ayr. 297.

28. The Court will order the bankrupt to join in a conveyance under section 78 of 6 Geo. 4. c. 16. *Ex parte Jackson*, 2 Dea. & Ch. 458.

29. The jurisdiction in cases of mortgage is assumed from principles of convenience; whether the mortgage be legal or equitable, the Court can only interfere when the case is perfectly free from doubt. Per Sir G. Rose. *Ex parte Broadbent*, 1 Mont. & Ayr. 641.

30. The Court has jurisdiction to order the sale of a legal mortgage. *Ex parte Bacon*, 2 Dea. & Ch. 181.

31. The Court has no jurisdiction to make an order for sale of an equitable mortgage when a necessary step is taking a partnership account between the bankrupt and strangers to the fiat. *Ex parte Broadbent*, 1 Mont. & Ayr. 635.

32. *Semble*, This Court has no power to commit on an adjourned examination from before one commissioner. *Re Heath*, 2 Dea. & Ch. 214.

33. Under the 6 Geo. 4. c. 16. s. 96. the Court have a general power, upon petition, to direct the proceedings to be entered of record. *Ex parte Thomas*, 3 Dea. & Ch. 292.

34. If, on a petition to supersede, the Lord Chancellor order a trial, which is in favour of the commission, the Court of Review cannot supersede, on a petition for costs, and a cross petition for a new trial, both brought on by way of further directions. *Ex parte Keys*, 1 Mont. & Ayr. 226. S. C. 3 Dea. & Ch. 263.

35. A petition prayed that the Court of Review would *reverse* an order of the Lord Chancellor annulling a fiat: it was objected that the Court had no power so to do: the objection was overruled; for,

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though the Court cannot actually rescind the order, it can intimate its opinion to the Lord Chancellor, who would act accordingly. Ex parte *Anjer*, 2 Dea. & Ch. 67.

36. The Court of Review has no power to dispense with the appellant's signature to a petition of appeal. Ex parte *Robinson*, 2 Dea. & Ch. 583.

37. The Court will not interfere between two adverse claimants; one claiming as equitable mortgagee, and the other under a prior lease. Ex parte *Royds*, 2 Dea. & Ch. 294.

38. An objection that the Court of Review had no jurisdiction cannot be taken on appeal, if not taken below. Ex parte *Turner*, 1 Mont. & Ayr. 357.

See SUPERSEDEAS, 1. 38. 39.

LAST EXAMINATION.

See SURRENDER, 2. 3. 4. 5.

LEGAL MORTGAGES.

1. The Court has jurisdiction to order sale of estate legally mortgaged. Ex parte *Bacon*, 2 Dea. & Ch. 181.

2. A petition for the sale of property in respect of which the creditor holds a legal security will be dismissed with costs, as the commissioners may sell under Lord Loughborough's order. Ex parte *Moore*, 3 Dea. & Ch. 7.

3. A legal mortgage of an equitable estate is within Lord Loughborough's general order. Ex parte *Aple*, 1 Mont. & Ayr. 621.

4. *Quære*. Whether a legal mortgage of an equitable estate, being

a third mortgagee, be entitled to his costs of petition to sell, &c., or whether he ought not to apply to the commissioners under the general order? Ex parte *Robinson*, 2 Dea. & Ch. 110.

LIEN.

1. The official assignee cannot, under 1 & 2 W. 4. c. 56. s. 22, take money belonging to the estate out of the hands of a solicitor without discharging his lien. Ex parte *Bowden*, 2 Dea. & Ch. 182.

2. If a party take bills for the price of goods, and it be agreed that the bills are to be paid out of the proceeds, and the acceptors become bankrupt, the indorsees of the bills without notice of the agreement are entitled to the benefit of it. Ex parte *Prescott*, 1 Mont. & Ayr. 316. S. C. 3 Dea. & Ch. 218.

S. P. The indorsees having notice. Ex parte *Copeland*, 3 Dea. & Ch. 199. S. C. Mont. & Bli.

3. The managing owner of a ship received the warrants for the freight, and paid them into a banker's in his own name, drawing checks from time to time for various sums out of the proceeds, part of which were applied for the use of the ship, and part for other purposes: Held, that the other part owners have no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors. Dub. Sir J. Cross. Ex parte *Gribble*, 3 Dea. & Ch. 339.

N. B. This decision was appealed against, and the appeal now stands for judgment.

4. A debenture for a tontine annuity was purchased by a father for his son in the name of a banker, who had possession thereof, and re-

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ceived the dividends thereon, and placed them to the credit of the father's accounts. The father died intestate in 1801; and in 1810 a commission issued against the banker, but he continued to receive the dividends, and pay them to the intestate's widow, up to the period of his own death, which happened in 1822; some time after which his assignees claimed a lien on the debenture for a debt due from the intestate to the banking house: Held, the assignees could not support the claim. Ex parte *Douglas*, 3 Dea. & Ch. 310.

See STOPPAGE IN TRANSITU.—

LOST FIAT.

See FIAT.

MASTER AND SERVANT.

See RELATION, 2.

MESSENGER.

1. In an action by a messenger against an assignee for the costs of advertizing a meeting, and of the room, it is not necessary for him to prove an employment by the assignee, nor any express recognition of him as messenger. *Hamber v. Persur*, 2 Crompt. & Mee. 209. S. C. 4 Tyr. 41.

2. The Court will not order the messenger to withdraw from possession of goods alleged to have been in the reputed ownership of the bankrupt. Ex parte *Harling*, 2 Dea. & Ch. 389. But the Court would so interfere as against the assignees. Ex parte *Wiggins*, Mont. & Bli. 389.

MESSENGER'S BILL.

See TAXATION, 5.

MEETINGS OF CREDITORS.

As to the weight entitled to the consent of a meeting of creditors, see ex parte *Thwaites*, 1 Mont. & Ayr. 323; ex parte *Beaumont*, 1 Mont. & Ayr. 304; and ex parte *Part*, 2 Dea. & Ch. 1. See also *Piercy v. Roberts*, 1 Mylne & Keen, 4.

See CONSOLIDATION.

MINES.

See PARTNERSHIP, 1.

MINOR.

See SUPERSEDEAS, 33.

MINUTES OF ORDER.

The Court will not vary the minutes of an order on the application of persons not parties to or bound by it. Ex parte *De Begnis*, 1 Mont. & Ayr. 279.

MORTGAGE.

See LEGAL MORTGAGE—EQUITABLE MORTGAGE.

MOTIONS.

1. A motion may be made that the registrar may review his certificate of taxation of costs. Ex parte *Richardson*, 1 Mont. & Ayr. 377.

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2. A petition may be necessary to oppose or amend it. Per Chief Justice, *ibid.*

3. Notice must be given of a motion for time to answer affidavits, unless made when the petition is called on. Ex parte *Binns*, 3 Dea. & Ch. 189.

See COSTS, 11. 13. 18. — PRACTICE, 8. 9. 10.

MULTIFARIOUSNESS.

1. What is multifarious. Ex parte *Devas*, 1 Mont. & Ayr. 423.

2. A petition by creditors to *ex-punge* proofs, to *admit* proofs, and to remove assignees, is not multifarious; but if that part as to the removal of the assignees be dismissed the petition becomes multifarious. Ex parte *Grazebrook*, 2 Dea. & Ch. 186.

NEW FIAT.

1. A bankrupt did not disclose a life interest which he possessed in certain property when he passed his last examination; and after the lapse of twenty years, when four of the commissioners were dead, he petitioned for a fiat to be issued to fresh commissioners, and that the assignee might be ordered to account. The Court allowed the bankrupt to issue a new fiat in the name of a creditor, but held that after this concealment he was not entitled to an inquiry against his assignee. Ex parte *Holder*, 3 Dea. & Ch. 276.

2. New fiat issued to give effect to more recent act of bankruptcy, time for opening not being expired. Re *Crawley*, 3 Dea. & Ch. 251.

NEW TRIAL.

A bankrupt petitioned to supersede; an issue was ordered as to the petitioning creditor's debt; the bankrupt at the trial took an objection to the debt not stated in his petition, and the verdict was against the commission. A new trial was granted, on the ground of surprise. Ex parte *Christie*, 2 Dea. & Ch. 461.

NOTICE.

See DEBT PROVABLE, 29.

NOTICE OF DISHONOR OF BILLS.

Notice of dishonor of a bill must be sent to the house of a bankrupt indorser, though he be not there, or the amount cannot be proved against his estate. The holder must use due diligence to give notice; the effect of such diligence is another thing. Notice must be given to the messenger, if in possession. *Quære*, As to the necessity of giving notice to the assignees? Ex parte *Johnston*, 1 Mont. & Ayr. 622. S. C. 3 Dea. & Ch. 433.

NOTICE OF MOTION.

Notice must be given of a motion to postpone the hearing of a petition, unless the motion is made when the petition is called on. Ex parte *Grazebrook*, 3 Dea. & Ch. 199. S. P. ex parte *Binns*, 3 Dea. & Ch. 189.

MOTIONS.

See PRACTICE, 28.

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ORDERS.

1. When a petitioner obtains a conditional order he must prosecute it, under peril of costs. Ex parte *Austen*, 2 Dea. & Ch. 384.

2. If after an order for sale of premises equitably mortgaged the assignees delay the sale, an application should be made to enforce the order, and not for a new order. Ex parte *Robinson*, 3 Dea. & Ch. 103.

See PRACTICE, 18. to 23.

OVER-RULED.

Anon., Buck, 475, over-ruled, semble. Ex parte *Coates*, 1 Mont. & Ayr. 333.

OFFICIAL ASSIGNEE.

1. The Court has a controlling power over the appointment of an official assignee by the commissioner. Ex parte *Bramston*, 2 Dea. & Ch. 375.

2. The Court will not compel the official assignee to join in a suit: if he refuse, and is made defendant, he may have to pay his own costs. Ex parte *Evans*, 1 Mont. & Ayr. 335. S.C. 3 Dea. & Ch. 470.

3. The Court has jurisdiction to revise an allowance made by the commissioner to an official assignee, but it seems will only exercise it in extreme cases. In this case interference refused. Cross, J., dissentiente. Ex parte *Tiplady*, 1 Mont. & Ayr. 162.

4. An official assignee not served appeared: Held, if the commissioner actually directed him to appear he

might take his costs out of the estate; *secus*, if only leave were given. Ex parte *Patrick*, 1 Mont. & Ayr. 393.

5. If an official assignee be included in an order for payment of costs, the order may be enforced against him alone. Ex parte *Murray*, 1 Mont. & Ayr. 475.

PARTNERSHIP.

1. In cases of mines bankruptcy is not, as in other cases, a dissolution of the peculiar partnership which exists. Per Chief Judge. Ex parte *Broadbent*, 1 Mont. & Ayr. 638.

2. In general a partner in a mining concern is considered as a sort of shareholder, rather than a partner in the common acceptance of the term. Per Chief Judge. Ex parte *Broadbent*, 1 Mont. & Ayr. 638.

3. If one of two partners, after he has committed an act of bankruptcy, dispose of partnership property as a fraudulent preference, and the other partner whilst solvent ratify the act of the bankrupt partner, and a commission issue against both partners — Q. Whether the disposition be valid against the assignees under a commission against both? Per Bayley, Baron. *Burt v. Moul*, 1 Crompton & Meeson, 530. S.C. 3 Tyrw. 570.

4. Where one of two partners commits an act of bankruptcy, he cannot afterwards bind the property either of his assignees or of the solvent partner. *Burt v. Moul*, 1 Crompton & Meeson, 529. S.C. 3 Tyrw. 569.

5. If, upon the formation of a partnership, one partner bring in, as his share of the capital, a brew-house and other premises, which are

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subject to mortgages for debts due by him, and afterwards retire from the business, and the continuing partners agree to take the brew-house and share of the business, &c. at a valuation, but the amount not to be paid till the mortgages were satisfied, and the continuing partner becomes bankrupt, and the amount of the valuation is due to the retiring partner, and the mortgage debts remain unpaid, and the assignees, before any proof be made by the retiring partner, pay off the mortgages, they are entitled to deduct the sums paid by them from the dividends on the sum due to the continuing partner at the time of the bankruptcy. *Rowe v. Anderson*, 4 Simon, 267.

6. A solvent partner may, after a secret act of bankruptcy committed by his co-partner, make the firm liable by accepting a bill for a previous liability. Ex parte *Robinson*, 1 Mont. & Ayr. 18. S. C. 3 Dea. & Ch. 376, reversing ex parte *Ellis*, Mont. & Bli. 249. S. C. 2 Dea. & Ch. 555.

7. A solvent partner may sue in his own name and the name of the assignees of the bankrupt partner; but the assignees may stay proceedings until he gives security for costs, or they may, in equity, restrain him from receiving the proceeds. *Whitehead v. Hughes*, 4 Tyrw. 92.

8. A., being a dormant partner with B., dissolves partnership, and B. is declared indebted to A. on the balance of accounts; A. sues B. for this balance, and receives a cognovit for the amount and costs; B. becomes bankrupt: Held, that A. is entitled to prove against B., though some partnership debts are unpaid. Ex parte *Grazebrook*, 2 Dea. & Ch. 186.

9. A joint fiat issued against two partners, then commissioners were appointed in pursuance of 1 & 2 W. 4. c. 56. s. 14., a separate fiat against a third partner cannot be directed to the old commissioners. Ex parte *Beague*, 1 Mont. & Ayr. 445.

10. If, upon the dissolution of partnership, the retiring partner assign the whole of his interest in the partnership to the continuing partner in consideration of a certain sum being secured to him, and the continuing partner, and two persons as his sureties, severally and respectively covenant that they or some one or more of them would pay the amount by instalments, and one of the sureties take the benefit of the Insolvent Act, his discharge is a bar to an action against him on the covenant for instalments which became payable after the discharge, it being *debitum in presenti solvendum in futuro*. *Guy v. Newson*, 2 Crompt. & Mee. 142.

See DEBT PROVABLE, 2. to 14. — PETITIONING CREDITOR'S DEBT, 3. 4. 5. — PROOF, 21.

PETITION.

1. An application to be discharged from custody, on the ground of the insufficiency of the warrant by the commissioners, must be made by petition. Ex parte *Jones*, 1 Mont. & Ayr. 703.

Form of.

2. Petitions in bankruptcy are not recognized as the deliberate acts of any professional person, but as the statement of the party presenting the petition. Per Sir G. Rose. Ex parte *Cunningham*, 3 Dea. & Ch. 72.

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3. A petition to stay the certificate, in order to prove, must show that the petitioner's debt would turn the certificate. Ex parte *Skipp*, 2 Dea. & Ch. 88. S. C. Mont. & Bli. 262.

4. A petition to stay the certificate, stating that the bankrupt admitted that he had lost 25*l*. in one sitting, is not sufficient; it ought positively to allege the fact, and that the money was lost in one day. Ex parte *Crouch*, 3 Dea. & Ch. 17.

5. A petition excepting to a master's report must specify the exceptions. Ex parte *Cox* and ex parte *Smith*, 3 Dea. & Ch. 11.

6. A petition to prove must state the grounds of rejection by the commissioners. Ex parte *Worth*, 2 Dea. & Ch. 4.

7. A petition to stay the certificate and to *prove* was presented: Held, 1st, It need not state that the petitioner is a creditor. 2d, It need not state when the debt was rejected. 3d, It need not state *what* debt was rejected. Ex parte *Robinson*, 1 Mont. & Ayr. 705.

Time of petitioning.

8. An assignee was removed, and ordered to account; pending that order, the new assignees petitioned to tax the bill of the solicitor employed by the removed assignee, &c.: Held premature, but ordered to stand over in this case. Ex parte *Carter*, 2 Dea. & Ch. 626.

Signature.

9. A petition by assignees is informal if signed by only one. Ex parte *White*, 3 Dea. & Ch. 366.

10. An order was obtained that an agent might sign a petition on behalf of a petitioner who was abroad, and which might have been

done under the general order, the special order was therefore rescinded. Ex parte *Moore*, 2 Dea. & Ch. 369.

11. A petition was in fact that of all the assignees; it was only signed by the official assignee: the Court presumed it a matter of convenience that the other assignees had not signed, and held the signature of the official assignee mere surplusage. Ex parte *Belcher*, 2 Dea. & Ch. 587.

Amending.

12. A petition wrongly entitled may be amended. *Anon.*, 2 Dea. & Ch. 22.

13. An order to amend was made by inserting a prayer for costs, on condition that a party should be served, and the petition be brought on for hearing in fourteen days. Default having been made in these conditions, the petition was dismissed, with costs. Ex parte *Green*, 2 Dea. & Ch. 85.

See LEGAL MORTGAGE, 2 3. 4.—
SERVICE, 4.

PETITIONING CREDITOR.

Becoming bankrupt before opening. See ex parte *Smith*, 3 Dea. & Ch. 309.

PETITIONING CREDITOR'S DEBT.

1. It has been said, that if an action be pending for rent, the landlord cannot be petitioning creditor for the debt. Per Tindal, C. J. *Middleton v. Mucklow*, 10 Bing. 401. S. C. 4 Moore & Scott, 263.

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2. Where the consignee transfers bills of lading to a creditor as a security for his debt, and the consignor stops the goods *in transitu*, the creditor may issue a fiat against the consignee on his original debt. Ex parte *Ashton*, 2 Dea. & Ch. 5.

3. The bankrupt (H.), who was in partnership, borrowed various sums of his partner W.P. personally, and upon the dissolution of the partnership purchased the stock in trade; W.P. made out an account, entitled, "Mr. H. (the bankrupt), in account with H. and W.P. : Held, that W.P. had a good petitioning creditor's debt, notwithstanding this mode of entitling the account. Ex parte *Robinson*, 3 Dea. & Ch. 244.

4. If money be advanced to a trader to enable him to commence a trade of which the lender is to share the profits, it is a good petitioning creditor's debt. Ex parte *Notley*, 1 Mont. & Ayr. 46. S. C. 3 Dea. & Ch. 367.

5. A docket was struck on a note on which the bankrupt and Warde were jointly liable; afterwards a tender was made on behalf of Warde; a petition to supersede for want of a petitioning creditor's debt dismissed: payment after docket struck would have been invalid. Ex parte *Jones*, 1 Mont. & Ayr. 442.

6. If a fiat be issued by an attorney on a bill of costs, the Court (K. B.) will not refer it for taxation at the instance of a third party against whom an action has been brought by the assignees, and who applies for the collateral purpose of so reducing the bill as to make the petitioning creditor's debt insufficient. *Clutterbuck v. Coombs*, 2 Nev. & Man. 209.

7. Where the commissioners find the petitioning creditor's debt insufficient, they should also find that the debt proposed to be substituted was incurred not anterior to the present one. Ex parte *Hunter*, 2 Dea. & Ch. 507.

8. So far as guarantees are concerned, a debt provable and a petitioning creditor's debt are convertible terms. Per Sir G. Rose. Ex parte *Simpson*, 1 Mont. & Ayr. 567.

9. Costs of substituting new petitioning creditor's debt ordered to be paid by petitioning creditor, under the circumstances. Ex parte *Lloyd*, 2 Dea. & Ch. 506.

10. A debt barred by the statute of limitations will not support a commission. See ex parte *Nokes*, 1 Mont. & Ayr. 461, and *Middleton v. Mucklow*, 10 Bing. 401.

See COMMISSIONERS, 5. — COSTS, 9.

POLICIES OF ASSURANCE.

See REPUTED OWNERSHIP, 21, 22.

PRACTICE.

1. The Chancellor may make an order in a particular case, altering the practice. *Dicas v. Lord Brougham*, 6 Carr. & Payne, 264.

Affidavits.

2. Petition not to stand over to have affidavits in reply filed till those in answer are read, to see whether they require an answer. Ex parte *Todd*, 3 Dea. & Ch. 57. S. P. ex parte *Dawson*, 3 Dea. & Ch. 17.

3. Where a petition is in the paper for hearing on Monday, and

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the respondent files his affidavits on Saturday, the petitioner is entitled to time to answer them. Ex parte *Gladdish*, 2 Dea. & Ch. 330.

4. Where affidavits in support are very voluminous, time will be given to answer them, on payment of costs, though the petition be in the paper of the day, and twelve days have elapsed since they were filed. Ex parte *Williamson*, 2 Dea. & Ch. 317.

5. Where a petition stands over to produce an affidavit of service, the respondent must have notice when the petition is to be brought on again. Ex parte *Mucklow*, 3 Dea. & Ch. 25.

Appeal.

6. Where a party wishes to appeal on petition, instead of special case, he must apply ex parte to have the matter heard on petition, and the respondent may subsequently move to set the order aside, if improperly obtained. Ex parte *Keys*, 1 Mont. & Ayr. 233. S. C. 3 Dea. & Ch. 266.

7. The pendency of an appeal is not sufficient ground for staying proceedings, more especially when it is plain that the appeal is brought for the purpose of delay. Ex parte *Hinton*, 2 Dea. & Ch. 407.

Commitment.

8. Practice as to commitment for nonpayment of money, &c. Note, 1 Mont. & Ayr. 262.

9. After an order to pay within a specified time, the next order is to pay within four days, or stand committed. This is of course at the office; but if circumstances render an application to the Court necessary, notice must be given to the other side. Ex parte *Malachy*, 1 Mont. & Ayr. 269.

10. If an order of committal be asked, the affidavit must state that the money is still due and owing, and that the party has not paid, or any person on his behalf, but the same strictness is not required on an intermediate order. Ex parte *Murray*, 1 Mont. & Ayr. 478.

Exceptions to Reports, &c.

11. A party intending to object to a report must either present a cross petition of exceptions or give notice of the nature of the objection. Ex parte *Millard*, 3 Dea. & Ch. 243.

12. A petition excepting to a report is heard before a cross petition to confirm it, notwithstanding the latter stands first in the paper. Ex parte *Cox*, and ex parte *Smith*, 3 Dea. & Ch. 11.

13. Not necessary to obtain leave to except to the Registrar's certificate of taxation. Ex parte *Crookwell*, 1 Mont. & Ayr. 579, in note.

Hearing of Petition.

14. To have an urgent petition heard in vacation, let it be answered and served; then apply to the registrar, who will communicate with the judges, who, if necessary, will appoint a special sitting. Ex parte *Harding*, 1 Mont. & Ayr. 115.

15. As to the authority of the Court of Review to hear a case in private, see ex parte *Chambers*, 2 Dea. & Ch. 395, and in re *Falk*, 2 Dea. & Ch. 415.

16. A petition specially answered for a particular day is placed at the head of that day's paper. Per Sir George Rose. Ex parte *Mucklow*, 3 Dea. & Ch. 25.

17. Nonpayment of taxed costs into Court not a preliminary objec-

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tion to a motion that the taxation may be reviewed. Ex parte *Richardson*, 1 Mont. & Ayr. 377.

Orders.

18. If, after an order for sale of premises equitably mortgaged, the assignees delay the sale, an application should be made to enforce the order, and not for a new order. Ex parte *Robinson*, 3 Dea. & Ch. 103.

19. New practice suggested on pronouncing an order of the Court. Ex parte *Francis*, 2 Dea. & Ch. 90.

20. The respondent not appearing when the petition was called, the petitioner took such order as he could abide by. The Court refused the application of the respondent on a subsequent day to restore the petition to the paper, where the only cause assigned for the respondent's nonappearance was, that his agent had overlooked the petition in the list. Re *Wilks*, 3 Dea. & Ch. 338.

21. When a petitioner, the respondent not appearing, takes such order as he can abide by, the other side may open the order at any time about six months. Ex parte *Thompson*, 1 Mont. & Ayr. 325.

22. An order of the Vice-Chancellor not drawn up, ordered to be entered *nunc pro tunc*. Ex parte *Lewis*, 3 Dea. & Ch. 198.

Orders by Consent.

23. Parties are bound by an order made by arrangement. Per C. J. Ex parte *Burnell*, 1 Mont. & Ayr. 43.

Rehearing.

24. Practice on rehearing. Ex parte *Thompson*, 1 Mont. & Ayr. 326.

Service.

25. Petition not served cannot be advanced. Ex parte *Harding*, 1 Mont. & Ayr. 115.

26. Restoring petition to the paper, when done. Ex parte *Thompson*, 1 Mont. & Ayr. 326.

Vivd voce Examination.

27. When a petition stands over to have a *vivd voce* examination, that side begins with whom the affirmative lies. Ex parte *Daly*, 1 Mont. & Ayr. 384.

Generally.

28. Before a motion is made that the petition of the bankrupt for a supersedeas shall be dismissed on the ground of his being out of the jurisdiction of the Court, the respondent should serve the bankrupt's agent with a notice of the motion, having previously obtained an order that service on the agent shall be good service. Ex parte *Drake*, 3 Dea. & Ch. 284.

29. A formal objection to a notice of motion is waived by the party appearing and requesting further time to oppose it. Ex parte *Morland*, 3 Dea. & Ch. 248.

30. Note as to practice on motions. 1 Mont. & Ayr. 100.

31. Where the person against whom a fiat is issued applies to the Court to stay the advertisement in the Gazette, and swears positively that he owes no debt to the petitioning creditor, and that the fiat is fraudulent, the Court will stay the insertion of the advertisement, the proceedings being in Court for inspection. Re *Fletcher*, 2 Dea. & Ch. 317.

32. On a petition to reverse the adjudication under section 17 of

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1 & 2 W. 4. c. 56. the bankrupt is entitled to copies of the depositions. Ex parte *Jackson*, 2 Dea. & Ch. 601. S. C. Mont. & Bli. 394.

33. When the bankrupt petitions to annul the fiat (a), on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions. Ex parte *Smith*, 3 Dea. & Ch. 101.

34. On a petition to reverse the adjudication under section 17 of 1 & 2 W. 4. c. 55. the assignees may adduce new evidence to establish the requisites. Ex parte *Jackson*, 2 Dea. & Ch. 601. S. C. Mont. & Bli. 394.

35. Petition to supersede for want of a petitioning creditor's debt. The deposition referred to an account, which purported to be annexed, but which was not. The hearing was adjourned for its production, the respondent paying the costs of the day. Ex parte *Clarke*, 2 Dea. & Ch. 86. S. C. Mont. & Bli. 265.

36. Where a proof is rejected the creditor may petition to prove, though the commissioners referred him to a subsequent meeting at which he declined to attend. Ex parte *Shipp*, 2 Dea. & Ch. 88.

37. On a summary application against the assignees for delivery up of goods seized by them from a stranger who claimed the goods as his, but who together with the bankrupt had been indicted for a conspiracy in secretly and fraudulently removing the goods, which indictment was pending, the Court refused to hear the petition till after the trial, as otherwise the assignees must disclose the evidence which they would use in support of the

indictment. Cross, J., dissent. Ex parte *Heath*, 2 Dea. & Ch. 140. S. C. Mont. & Bli. 169.

See CERTIFICATE—SERVICE, 3.—
STAYING ADVERTISEMENT IN
GAZETTE.

PREFERENCE, FRAUDULENT.

1. The cases with respect to a preference from a delivery of goods in contemplation of bankruptcy have gone much further than they ought. D. Littledale, J. *Morgan v. Brundret*, 5 Barn. & Adol. 296. S. C. 2 Nev. & Man. 286; but see the case, and what the other judges say.

2. In a preference, the transfer must be made voluntarily, and in contemplation of bankruptcy. D. Littledale, J., and Parke, J. *Morgan v. Brundret*, 5 Barn. & Adol. 296.

3. To show that a transfer is voluntary, it ought to appear that the bankrupt is the actor. D. Pattison, J. *Morgan v. Brundret*, 5 Barn. & Adol. 296.

4. Although there be not any limit to the time within which a preference may be over-reached, it requires great caution to invalidate on the ground of preference after a lapse of six months. Per Tindal, C. J. *Belcher v. Prittie*, 10 Bing. 416.

5. A transfer, in contemplation of insolvency, is not sufficient to constitute a preference. *Morgan v. Brundret*, 5 Barn. & Adol. 296.

6. A transfer of property by an insolvent trader is not a fraudulent preference, if it were upon the pressure *bond fide* of the creditor. *Morgan v. Brundret*, 2 Nev. & Man. 287.

7. If a trader be engaged in an extensive and doubtful concern, and in pecuniary difficulty, and his son

(a) Qu. to reverse the adjudication?

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apply to him for security for payment of a bond given to the trustees of the son's marriage settlement, and security is given accordingly, and the trader stand his ground for six months afterwards, and the jury find that he did not give the security spontaneously to favour the son, but in consequence of the application made by him, the Court will not disturb the verdict. *Belcher v. Prittie*, 10 Bing. 407. S.C. 4 Moore & Scott, 237.

8. A slight application on the part of a son may be as strong towards a father as if a stranger had threatened to arrest. Per Parke, J. *Belcher v. Prittie*, 10 Bing. 420. S.C. 4 Moore & Scott, 295.

9. If one of two partners commit an act of bankruptcy, and the next day hand over a post bill and money to the agent, the drawer, who resides abroad, of a bill accepted by the firm, becoming due in a few days, for the purpose of anticipating the payment of the bill, and by way of fraudulent preference in contemplation of bankruptcy, and afterwards on the same day the other partner also commit an act of bankruptcy, who, previous to committing the act of bankruptcy, did not know of the delivery of the bill and money, and a commission issue against both partners, the assignees may recover from the agent of the creditor the amount of the property handed over to him after this act of bankruptcy by the one partner. *Burt v. Moulth*, 3 Tyrw. 564.

10. If one of two partners, after he has committed an act of bankruptcy, dispose of the partnership property as a fraudulent preference, and the other partner, while solvent, ratify the act of the bankrupt partner, and a commission issue against both, *quære*, whether the disposi-

tion be good against the assignees under a commission against both? Per Bayley, B. 1 Crom. & Mee. 530. S. C. 3 Tyrw. 570.

11. If a trader transfer to a creditor property to such an extent as will prevent him from continuing his business, and render him insolvent, it is an act of bankruptcy. But those who rely upon such act of bankruptcy on a trial must show that it was calculated to have the alleged effect, by evidence of the general state of the party's affairs at the time of such conveyance; and it is not sufficient to prove that the trader, under pecuniary pressure, disposed of some article essential to the carrying on of his business; as that a miller, by bill of sale, transferred his waggon and horses to a creditor who had arrested him. *Wedge v. Newlyn*, 4 Barn. & Adol. 831.

12. The Court of Review has not jurisdiction to order property, alleged to have been given as a fraudulent preference, to be delivered up because the party has claimed. *Ex parte Dobson*, 1 Mont. & Ayr. 666.

PRINCIPAL AND AGENT.

A., in France, employs B., in England, to sell wines on commission, as well as to purchase other wines on A.'s account in London, for which purpose he furnishes him with letters of credit; the wines were generally bought and sold by B. in his own name; B. became bankrupt: Held, that A. might sue the purchasers of the wines in the name of B. or his assignees; but that no order could be made for the payment to A. of any monies the produce of the wines, if mixed with

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the other monies of B. at the time of his bankruptcy. Ex parte *Molant*, 3 Dea. & Ch. 351.

PRIVATE CONTRACT.

As to assignees applying to the Court to sanction a sale by, see ex parte *Ladbroke*, 1 Mont. & Ayr. 384.

PROCEEDINGS.

1. The solicitor is bound to deliver up the proceedings to a fresh solicitor appointed by the surviving assignee, and cannot retain them until a new assignee is chosen in the room of the one who is dead. Ex parte *Achroyd*, 3 Dea. & Ch. 21.

2. The Court will not order the registrar to attend with the proceedings at the trial of an action on behalf of a stranger to the commission. Ex parte *Munt*, 3 Dea. & Ch. 233.

PROOF.

1. Under a fiat against a banker, one person allowed to prove in behalf of a large number of holders of L. notes, not interfering as to the assignees or the certificate. Ex parte *Gordon*, 1 Mont. & Ayr. 282.

2. If two proofs be made on a joint and several bond against two separate estates, a subsequent consolidation of the estates does not affect the double proof. Ex parte *Fuller*, 1 Mont. & Ayr. 222.

3. Bankrupt executor to prove against his own estate. Ex parte *Calman*, 2 Dea. & Ch. 584.

4. A creditor of a testator or intestate has no right of proof against the estate of the bankrupt executor or administrator. *Searle v. Bradshaw*, 4 Tyrw. 69.

5. After issuing a fiat, the petitioning creditor assigned his debt; the assignee of the debt cannot prove, but may call the petitioning creditor to prove as trustee for him. Ex parte *Dickenson*, 2 Dea. & Ch. 520.

6. When a proof is rejected the creditor may petition to prove, though the commissioners referred him to a subsequent meeting at which he refused to attend. Ex parte *Shipp*, 2 Dea. & Ch. 88.

7. It is no objection to a proof under a third commission that the creditor might have proved under a second commission under which the bankrupt has obtained his certificate, but has not paid 15s. in the pound. Ex parte *Morley*, 2 Dea. & Ch. 45.

8. Where a proof was not made through the solicitor's default, another meeting for proof was appointed at the creditor's expence, the dividend stayed in the meantime, and to be remodelled if necessary, the assignees consenting. Re *Tatham*, 2 Dea. & Ch. 554.

9. A creditor, relying on the promise of the provisional assignee to inform her of the progress of the commission, which he failed to do, did not prove, and a dividend was declared: Ordered, that the creditor might prove within a month, and that payment of the dividend be suspended in the meantime, Ex parte *Colton*, 3 Dea. & Ch. 194.

10. Wines sold to the bankrupt at a long credit, having been sold by the assignees at a loss, the commissioner reduced the vender's proof for the price, on the ground

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that the prices charged the bankrupt were too high: Held, this could not be done. Ex parte *Reay*, 3 Dea. & Ch. 175.

11. A party is not estopped from amending his deposition of proof, by making a second deposition contrary to the first. Ex parte *Britten*, 3 Dea. & Ch. 35.

12. Quære, Can the Court of Review entertain a petition of appeal from the rejection of the commissioners of a proof of debt on a question of fact? Ex parte *Turner*, 1 Mont. & Ayr. 268.

13. After payment of the first instalment, under a composition deed not containing a release, a fiat issued against the debtor; the creditors may prove for the residue, without refunding the instalment, being protected by the 82d section of 6 Geo. 4. c. 16. Ex parte *Wood*, 2 Dea. & Ch. 508.

14. Notice of the dishonour of a bill must be sent to the house of a bankrupt, though he be not there, or it cannot be proved against his estate.

The holder must use due diligence to give such notice; the effect of such diligence is another thing.

Notice must be given to the messenger, if in possession. Ex parte *Johnston*, 1 Mont. & Ayr. 622. S. C. 3 Dea. & Ch. 433.

15. A. gives accommodation bills to B., which B. gives to C. in exchange for accommodation bills given by C. to B.: Held, A.'s bill is provable by the assignees of C. against the estate of A., but the dividend reserved. Ex parte *Solarte*, 1 Mont. & Ayr. 270. S. C. 3 Dea. & Ch. 419.

16. F. and Co. sold cochineal to John W.; a small part of the price was paid in cash, and the remainder

by two bills at four months, but the cochineal was to remain in the hands of F. and Co. as security for payment of the bills. The bills not being paid when due, John W. sent F. and Co. two other bills drawn by himself on Joshua W., for which no consideration was given to Joshua W. the acceptor. Before these bills fell due, both Joshua W. and John W. became bankrupts, and the price of cochineal had fallen so much in the market that F. and Co. afterwards sold it for not a third of the price at which John W. had bought it, and they then proved for the deficiency under John W.'s commission. Held, that they had also a right to prove the amount of the two bills under Joshua W.'s commission, without deducting the proceeds arising from the sale of the cochineal. Ex parte *Fairlie*, 3 Dea. & Ch. 285.

17. A creditor took a joint and several bond, and as collateral security took a joint warrant of attorney, and thereon entered up a joint judgment: Held, that the bond was merged in the judgment, and that the creditor cannot prove against the separate estates of either of the obligees, but only against the joint estate. Ex parte *Christie*, 2 Dea. & Ch. 155. S. C. Mont. & Bli. 352.

19. The holder of a bill, without notice that the indorser and acceptor are members of the same firm, is not entitled to double proof. Ex parte *Moult*, 2 Dea. & Ch. 419. S. C. Mont. & Bli. 28.

19. A testator, indebted on bond, devised his real estate to the bankrupt and others, on trust for payment of his debts. The bond creditor brought an action, and recovered a *joint* judgment against all the trustees. Held, he could not prove under a separate commission

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issued against the bankrupt. Ex parte *Pearce*, 2 Dea. & Ch. 451. S. P. ex parte *Christie*, Mont. & Bli. 352.

20. A bill may be proved against the firm which was given by the solvent partner after a secret act of bankruptcy by the co-partner. Ex parte *Robinson*, 1 Mont. & Ayr. 18. S. C. 3 Dea. & Ch. 376, reversing ex parte *Ellis*, Mont. & Bli. 249. S. C. 2 Dea. & Ch. 376.

21. A firm, composed of A. and B., may prove against a firm composed of B. and C. Ex parte *Thompson*, 1 Mont. & Ayr. 324.

22. A claim or proof cannot be resisted because the creditor has property belonging to the estate in his possession; that is only ground to restrain payment of the dividends. Ex parte *Dobson*, 1 Mont. & Ayr. 666.

See DEBT PROVABLE — PETITION, FORM OF, 3. 6. — STATUTE OF LIMITATIONS.

PROPERTY ASSIGNABLE.

An assignment by a ship owner of freight to be earned is good against the assignees under a fiat against the ship owner. *Douglas v. Russell*, 4 Sim. 524, affirmed on appeal, 1 Mylne & Keen, 488.

PROPERTY DISTRIBUTABLE.

1. An execution upon a judgment on a *warrant* of attorney is not protected by 1 W. 4. c. 7. s. 7. but is within the 108th section of 6 G. 4. c. 16. *Crossfield v. Stanley*, 1 N. & M. 669. S. C. 4 Barn. & Adol. 87.

2. A gift by a testator to his wife and son, for their occupation so long as they carry on the testator's trade, does not pass to the assignees under a commission against the wife and son. *Thompson v. Andrews*, 1 Mylne & Keen, 116.

3. A testator bequeathed a legacy to his executors, upon trust to pay the same to his son, in such smaller or larger portions, at such time or times, and in such way or manner, as they should in their judgment and discretion think best: Held, that the discretion of the executors was determined by the insolvency of the legatee, and that the legacy vested in the assignee of the insolvent. *Piercy v. Roberts*, 1 Mylne & Keen, 4.

4. The 127th section of 6 Geo. 4. c. 16. is retrospective. *Elston v. Braddick*, 4 Tyrw. 122.

PURCHASE BY ASSIGNEES.

See ASSIGNEES, 22. 23.

PURCHASE BY MORTGAGEE.

See EQUITABLE MORTGAGES, 17. 18. 19.

REFERENCES.

See CONSOLIDATION, 2. — AFFIDAVITS, 5. 8. — SCANDAL.

REFUNDING DIVIDEND.

See DIVIDEND, 3.

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REHEARING.

1. All questions are open on rehearing. Ex parte *Greenwood*, 1 Mont. & Ayr. 68.

2. Practice on petition of rehearing. Ex parte *Thompson*, 1 Mont. & Ayr. 326.

3. An application for a rehearing is by petition, not motion. Ex parte *Cunningham*, 3 Dea. & Ch. 70.

4. On a rehearing, the party petitioning opens. Ex parte *Cunningham*, 3 Dea. & Ch. 73.

5. A petition of rehearing in bankruptcy is not limited to six months. Ex parte *Greenwood*, 1 Mont. & Ayr. 65. S.C. 3 Dea. & Ch. 398.

6. The time for rehearing ought to be limited. Per Sir J. Cross. Ex parte *Simpson*, 1 Mont. & Ayr. 565.

7. A petition for rehearing need not state the ground on which the rehearing is sought: if it do, the party is limited to the special ground stated. Ex parte *Greenwood*, 1 Mont. & Ayr. 65.

8. If on a rehearing new facts be introduced, it must be by a supplemental petition; the original petition being also set down for rehearing. Ex parte *Cunningham*, 3 Dea. & Ch. 71.

9. No rehearing as to costs alone. Ex parte *Burnell*, 2 Dea. & Ch. 640.

10. No rehearing for costs omitted by mistake. Ex parte *Burnell*, 1 Mont. & Ayr. 38.

11. The rule that no petition for rehearing is allowed for costs only, does not apply, *come semble*, to a rehearing on the ground of an erroneous decision on the merits, although the material effect of such decision may be to render the party liable for costs. Ex parte *White*, 2 Dea. & Ch. 334.

RELATION.

1. An agreement for a lease is not annulled by the bankruptcy of the intended lessee. *Morgan v. Rhodes*, 1 Mont. & Ayr. 216. S.C. 1 Mylne & Keen, 435; and see *Crosbie v. Tooke*, 1 Manning & Ryland, 431.

2. Upon the hiring of a servant by the year, the issuing a commission against the master during the year, is not a dissolution of the contract. *Thomas v. Williams*, 3 Nev. & Man. 549.

3. A loan of money, on a pledge, is not protected by sect. 82. of 6 Geo. 4. c. 16. *Cannon v. Denew*, 10 Bing. 296.

4. A payment on a sale of goods is protected by section 82. of 6 Geo. 4. c. 16. Per Tindal, C.J. *Cannon v. Denew*, 10 Bing. 296.

5. If a trader in England be in the habit of consigning goods to his agent in America for sale, on the faith of which consignments he draws bills upon the agent, which are negotiated through a mercantile house in London, and, upon the non-acceptance by the agent of some of the bills, the mercantile house request the trader to order his agent, if he do not pay the bills, to deliver to the correspondent of the mercantile house, such property as he has of the traders, and such order is accordingly given, the event upon which the transfer is to be made and the amount of the transfer being very uncertain, but before it reach America the trader commit an act of bankruptcy, upon which, after the arrival of the letter in America, a commission issues, and after the issuing the commission the goods are delivered to the correspondent: Held, the goods pass to the assignees under the commission. *Carvalho v. Burn*, 4 Barn. & Adol. 383.

See VALID PAYMENTS.

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RENEWED FIAT.

A renewed fiat must be taken out by or in the name of a creditor for 100*l.* Ex parte *Maule*, 1 Mont. & Ayr. 46.

See FIAT, 10.

RENT.

See PETITIONING CREDITOR'S DEBT, 1.

REPORTS.

The master's report should only state facts, leaving the conclusions of law to the Court. Ex parte *Cox* and ex parte *Smith*, 3 Dea. & Ch. 11.

See PETITION, FORM OF, 5.—
PRACTICE, 11. 12. 13.

REPUTED OWNERSHIP.

1. If the true owner of goods, in the order and disposition of a trader, demand them from him before an act of bankruptcy, they will not pass to the assignees under 6 Geo. 4. c. 16. s. 72. *Smith v. Topping*, 2 Neville & Manning, 421.

2. The consent of the real owner, and not merely of an intermediate possessor, is necessary, in order that property should pass as in the reputed ownership. *Fraser v. Swansea Canal Company*, 3 Neville & Manning, 391.

3. In an action by the proprietor against a person who has seized his goods, which were in the possession of a trader who afterwards committed an act of bankruptcy, the defen-

dant cannot set up title of the assignees, upon the ground of the goods having been in the reputed ownership of the bankrupt. *Fraser v. Swansea Canal Company*, 3 Neville & Manning, 391.

4. The question in reputed ownership often is, not whether they be chattels, but admitting that, whether they be such of which the possession draws along with it the reputation of ownership. Per Sir G. Rose. Ex parte *Rucker*, 1 Mont. & Ayr. 493.

5. A steam-engine erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, will not pass to the assignees of the tenant on his bankruptcy, for it does not pass to assignees under the description of "goods and chattels" in 6 Geo. 4. c. 16. s. 72, nor had the bankrupt the actual or apparent ownership. *Coombs v. Beaumont*, 5 Barn. & Ad. 72. S.C. 2 Neville & Manning, 235.

6. There seems not to be any distinction with respect to reputation of ownership between such fixtures as would, as between landlord and tenant, be removeable, and those which would not. D. Parke, J. *Coombs v. Beaumont*, 5 Barn. & Adol. 72. S.C. 2 Neville & Manning, 235.

7. The furniture and fixtures of a coal mine is property of which the party who works the mine is the reputed owner, and which, upon his bankruptcy, pass to the assignees, under 6 Geo. 4. c. 16. s. 72, unless the reputation of ownership is rebutted by any custom to let. *Coombs v. Beaumont*, 2 Neville & Manning, 235. 5 Barn. & Adol. 72.

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8. Machinery and utensils affixed to the inheritance for the purposes of trade only, in a place where, as such, they would, as between landlord and tenant, have commonly been removed, and may in fact be removed without injury to the freehold, are not to be taken as part of the inheritance, but as personal estate, and pass to assignees. *Trappes v. Harter*, 3 Tyrw. 628. S.C. 2 Crompton & Meeson, 153.

9. Machinery and utensils affixed to the freehold for the purposes of trade, which, from the circumstances of its erection, necessarily became part of the freehold, do not pass to the assignees of the tenant. *Trappes v. Harter*, 3 Tyrw. 603.

10. Tenants fixtures are not in the reputed ownership of a bankrupt, so as to prejudice a mortgagee. *Boydell v. Macmichael*, 1 Crompton, Meeson, & Roscoe, 177.

11. The assignees are entitled to trade fixtures. Ex parte *Lloyd*, 1 Mont. & Ayr. 503.

12. A mortgage was made of premises and machinery which included a steam-engine, &c. erected for trade purposes, and fixed to the freehold; the mortgagors continued in possession, and become bankrupt: Held, 1st, the steam-engine might be removed; 2d, it was well mortgaged, and not in the reputed ownership. Ex parte *Loyd*, 1 Mont. & Ayr. 494.

13. Cart-horses hired by iron-mongers are not in their reputed ownership, there being a well-known custom to hire them. Ex parte *Wiggins*, 2 Dea. & Ch. 269. S.C. Mont. & Bli. 168.

14. A. is in the habit of sending skins to B.'s tan yard to be dressed, with an account of the dressed leather, as being sold by him to A.; this mode of dealing was only prac-

tised by B. with A., nor was B. in the habit of dressing skins for any other person; a quantity of these skins were mixed with B.'s general stock at the time of his bankruptcy: Held, they passed to his assignees. Ex parte *Batten*, 3 Dea. & Ch. 329.

15. If B. have possession of A.'s wines to sell on commission, and they stand in the name of B., and A. closes the connexion, and requires B. to deliver up the wines, which B. neglects to do, and becomes bankrupt, the wines are not in his reputed ownership. Ex parte *Moldant*, 3 Dea. & Ch. 351.

16. It has been agitated whether to prevent the operation of reputed ownership it be necessary to give notice to the trustee of the assignment of the equitable interest of which he is trustee. *Smith v. Smith*, 2 Crompton & Meeson, 231. S.C. 4 Tyrw. 56.

17. Notice to one of several trustees is sufficient to prevent the reputation of ownership in trust property. *Smith v. Smith*, 4 Tyrw. 54. S.C. 2 Crompton & Meeson, 231.

18. If notice of an assignment of an equitable interest be given to a trustee, the reputation of ownership is rebutted, whatever be the purpose for which the notice was given. *Smith v. Smith*, 4 Tyrw. 55. S.C. 2 Crompton & Meeson, 231.

19. A mere conversation between the agent of the assignee and a clerk at the insurance office is not notice to the office. Ex parte *Carbis*, 1 Mont. & Ayr. 693, in note.

20. A debenture of a tontine annuity was purchased by a father for his son, in the name of a banker, who had possession thereof, and received the dividends thereon, and placed them to the credit of the father's accounts, is not, on the bankruptcy of the banker, in his reputed

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ownership, as he held it on a trust. Ex parte *Douglas*, 3 Dea. & Ch. 310.

21. The bankrupt assigned two policies of insurance, but gave no notice; the assignee wrote to the office, "I am the holder of the undermentioned policies," and inquiring what the office would give for them: Held sufficient to prevent the reputed ownership from attaching. Ex parte *Stright*, 2 Dea. & Ch. 314. S.C. Mont. & Bli. 502.

22. Where shares of an insurance company are held in the name of the bankrupt, who is trustee, they are not in his reputed ownership. Ex parte *Watkins*, 1 Mont. & Ayr. 689.

23. If one of two joint creditors assign to his co-creditor his interest in the debt, notice must be given to the debtor to prevent the operation of reputed ownership. *Dean v. James*, 1 Neville & Manning, 392.

24. Upon the assignment of a debt the reputed ownership is in the assignor until notice is given to the debtor. *Buck v. Lee*, 3 Nev. & Man. 580.

25. The husband and wife transferred the wife's interest in a legacy to a creditor of the husband, the creditor gave notice to the executor, who said he would not pay to the creditor, but to the wife; after which the husband assigned all his property to the assignees under the insolvent act, after which the legacy was paid to the wife: Held, the interest in the legacy passes to the assignees. *Best v. Argles*, 2 Crompton & Meeson, 394.

26. A ship-owner assigned to A.B. the freight earned and to be earned of a ship; he delivered the charter-party to A.B., and gave notice of the assignment to the person to whom the ship was chartered; the owner became bankrupt: Held,

the freight was not in his reputed ownership. *Douglass v. Russell*, 4 Sim. 524, affirmed on appeal, 1 Mylne & Keen, 488.

27. The Court can order the assignees to deliver up property alleged to have been in the reputed ownership of the bankrupt. Ex parte *Moldant*, 3 Dea. & Ch. 351.; see ex parte *Wiggins*, Mont. & Bli. 168. S.C. 2 Dea. & Ch. 209, and constant practice.

28. The Court will not order the messenger to withdraw from possession of goods alleged to have been in the reputed ownership of the bankrupt. Ex parte *Harling*, 2 Dea. & Ch. 389.

RESERVED BIDDING.

On the sale of the property pledged, the assignees cannot have a reserved bidding. Re *Skinner*, 1 Mont. & Ayr. 81.

RESTORING PETITION TO PAPER.

When done. Ex parte *Thompson*, 1 Mont. & Ayr. 326.

RETAINER OF SOLICITOR.

As to the retainer of a solicitor, see ex parte *Coates*, 1 Mont. & Ayr. 330.

RETROSPECTION.

See CONSTRUCTION.

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SALES.

See JURISDICTION OF THE COURT OF REVIEW, 6. 12. 13. 19. 28. 30. 31.

SCANDAL.

An affidavit may be referred for scandal after the hearing of the petition. Ex parte *Williamson*, 2 Dea. & Ch. 414.

See AFFIDAVITS, 5, 6.

SEAL OF COURT OF REVIEW.

Quære, as to necessity for affixing a seal to the orders of the Court of Review? *Airton v. Davis*, 1 Mont. & Ayr. 258, in note.

SECOND COMMISSION, OR FIAT.

1. It is not of course to supersede a second commission against an uncertificated bankrupt on the application of the assignees, &c. under the first. Ex parte *Devas*, 1 Mont. & Ayr. 420.

2. If the existence of two commissions create inconvenience, one of them, probably the first, will be superseded. Per Sir George Rose. Ex parte *Devas*, 1 Mont. & Ayr. 436.

SECURITY FOR COSTS.

See COSTS, *Security for*.

SERVANTS.

Upon the hiring of a servant for a year, the issuing a commission against the master during the year is not a dissolution of the contract. *Thomas v. Williams*, 3 Nev. & Man. 549.

See ALLOWANCE to Servants.

SERVICE OF PETITION.

1. If one of two assignees petitions, the other must be served. Ex parte *Harris*, 2 Dea. & Ch. 4.

2. Where an executor becomes bankrupt, the petition praying that a sum might be paid over to which the petitioner was entitled under the trusts of the will must be served on the other executor, on the bankrupt, and on the assignees. Ex parte *Cutting*, 2 Dea. & Ch. 3.

3. Where, on a petition to stay the certificate, the bankrupt's solicitor requested delay, and undertook to serve the petition on the bankrupt, the latter cannot afterwards have the petition called on, out of turn, to be dismissed for want of personal service. Semble, That the rule, that a bankrupt cannot waive the necessity of personal service of a petition to stay his certificate, does not apply where a professional man is interposed. Ex parte *Hetherington*, 1 Mont. & Ayr. 607.

4. The petition of an equitable mortgagee must be served on the assignees; service on the solicitor to the commission is not enough. Ex parte *Cooks*, 3 Dea. & Ch. 24.

5. On a petition by the assignees to expunge a proof made on a bill of exchange, the proof being made by the holder against the acceptor,

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on the ground that it had since been paid by a third party, the drawer must be served, though the assignees have the bill in their possession. Ex parte *Greenwood*, 1 Mont. & Ayr. 65. S. C. 2 Dea. & Ch. 398.

6. It seems a party may depose *vivd voce* to having been served. Ex parte *Tull*, 1 Mont. & Ayr. 225.

7. If the sole assignee be a creditor and sign the consent to the supersedeas, he need not be served with the petition to supersede. Ex parte *Ramsay*, 1 Mont. & Ayr. 708.

8. Where no charge is made against commissioners in a petition served on them, they need not appear. Ex parte *Perkins*, 1 Mont. & Ayr. 525.

9. If the creditors who elect an assignee be relations, and their debts *prima facie* of a doubtful nature, the assignee might be removed without serving the creditors. Per Chief Judge. Ex parte *Copeland*, 1 Mont. & Ayr. 307.

10. Petition not served cannot be advanced. Ex parte *Harding*, 1 Mont. & Ayr. 115.

SERVICE, SUBSTITUTED.

1. Substituted service of an order to pay money not allowed. Ex parte *Sandys*, 3 Dea. & Ch. 34.

2. Substituted service on the petitioning creditor allowed, under the circumstances, of a petition to annul a fiat. Ex parte *Sell*, 2 Dea. & Ch. 333. S. P. ex parte *Peppin*, 2 Dea. & Ch. 361.

4. A petition to remove assignees was ordered to stand over to institute enquiries; one of the assignees afterwards absconded; substituted service on his solicitor, of a petition

to confirm a report unfavourable to him, ordered. Ex parte *Cox*, 2 Dea. & Ch. 191.

SET-OFF.

1. Where there are cross acceptances, and the right of set-off clear, the Court will restrain the assignees from bringing an action. Ex parte *Clegg*, 1 Mont. & Ayr. 91.

2. If a London banker return one bill to his country correspondent, and debit him with the amount, and the banker have in his hands sufficient assets to pay the bill, and the correspondent, after the arrival of the bill, return it to the bankers, that he may set off the amount against acceptances of the bankers in the hands of the customer from whom the returned bill was received, it cannot be set-off. *Belcher v. Lloyd*, 10 Bing. 310.

3. If the bankrupt, after the bankruptcy, and before his certificate, sell goods to one of his creditors, the creditor cannot, in an action brought by the bankrupt, after obtaining his certificate, for the price of the goods, set-off the old debt, it being barred by the certificate. *Hayllar v. Sherwood*, 2 Nev. & Man. 401.

4. Payments improperly made as the consideration for signing a composition deed may be deducted or set-off from a proof made under a subsequent fiat for a subsequent debt. Ex parte *Minton*, 1 Mont. & Ayr. 440.

5. J. apprenticed his son to the bankrupt two years before his bankruptcy, and agreed to pay a premium of 200*l.*; J. was in partnership with T., and the bankrupt owed

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them a joint debt exceeding the amount due from J. to the bankrupt: Held, J. cannot set-off the apprentice fee against the joint debt due from the bankrupt to J. and T.

The Court ordered 100*l.* to be paid by J. to the assignees, together with the costs of the petition. *Ex parte Soames*, 3 Dea. & Ch. 320.

SHERIFF.

1. In an action of trover by assignees against a sheriff for goods of the bankrupt seized under a *fi. fa.* after notice of an act of bankruptcy, the Court will not stay the proceedings, upon the sheriff paying to the assignees the produce of the goods and restoring fixtures, unless they agree to the amount to be recovered. *Gibson v. Humphrey*, 3 Tyrw. 589.

2. If the sheriff delay selling under a *fi. fa.* for an unreasonable time, and in the interval an act of bankruptcy be committed, by which the plaintiff be damnified, the sheriff, on proof of the injury by the bankruptcy, is liable to the plaintiff. *Bales v. Wingfield*, 2 Nev. & Man. 831.

3. If the sheriff levy under a *fi. fa.* upon a judgment on a warrant of attorney, and after the seizure the defendant commit an act of bankruptcy, and the sheriff proceed to sell, and on the second day of sale, when nearly concluded, notice of the act of bankruptcy be given to the sheriff, and that a docket has been struck, and after which he receive the proceeds, and pay them over to the execution creditor, the sheriff is liable in an action of assumpsit by the assignees. *Crossfield*

v. Stanley, 1 Nev. & Man. 669. S. C. 4 Barn. & Adol. 87.

4. Whether a sheriff who, in obedience to a *feri facias*, seizes the goods of a trader after a secret act of bankruptcy, be liable in trover by the assignees. *Garland v. Carlile* in error, S. C. 6 M. & Sco. 24. 3 Tyrw. 705. S. C. 10 Bing. 298. S. C. 2 Cr. & Mee. 31. Gurney, J., Taunton, J., Parke, J., and Littledale, J., pro.: Denman, C. J., Vaughan, B., Bolland, B., and Bayley, B., contra, who dissented from *Balme v. Hutton*, as decided in error, 2 Tyrw. 620. 2 Cr. & Jer. 19. 1 Cr. & Mee. 262.

See EVIDENCE, 10.

SHORT BILLS.

Any party has a right to come to the Court for relief against the assignees, in respect of all acts done by them as such; this is the ground of the interposition of the Court in the case of short bills. Per Chief Judge. *Ex parte Clegg*, 1 Mont. & Ayr. 92.

SIGNATURE TO PETITION.

See PETITION, Signature to, 9. 10. 11.

SINE DIE ADJOURNMENT.

See ADJOURNMENT SINE DIE.

SIX MONTHS WAGES TO SERVANTS.

See ALLOWANCE to Clerks and Servants.

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SOLICITOR.

1. The Court will exercise summary jurisdiction over a solicitor for acts done as an officer of the Court only. Ex parte *Bull*, 3 Dea. & Ch. 116.

2. For the consequences of advice given to the assignees, whereby the estate is injured, the Court will hold an attorney liable. Per Chief Judge. Ex parte *Bull*, 3 Dea. & Ch. 119.

3. A petition that three attorneys should pay to the assignees money received by the former as the bankrupt's solicitors under an order in Chancery, dismissed, as one of the three was not a solicitor of the Court of Review.

Quære. Whether it would have been ordered if all three had been solicitors of that court? *Semble*, not.

Ex parte *Hicks*, 2 Dea. & Ch. 573.

4. "On behalf of J. P. I hereby give you notice, that, &c. and on such behalf as aforesaid I give you this further notice, that *I am* ready and hereby offer to allow and pay the costs of," &c.: Held, a *personal* undertaking by the solicitor. Ex parte *Bentley*, 2 Dea. & Ch. 578.

5. Solicitor ordered to deliver the proceedings and monies to the assignees. Ex parte *Hudson*, 2 Dea. & Ch. 507.

6. Quære. Whether the bill to the choice of assignees must be taxed by the commissioners before the solicitor can sue upon it, if the assignees waive the objection? *Barron v. Husband*, 1 Nev. & Man. 730.

7. If, at the meeting for choice of assignees, all the creditors refuse to become assignee, but the creditors apply to a stranger, who is present, to become assignee, and the stranger state that he will not do so to incur any liability, upon which

the solicitor to the commission give him an undertaking to indemnify him from all the consequences, and he then consents and is appointed assignee, this engagement is not illegal. *Gilmour v. King*, 1 Cr. & Mee. 616. S. C. 3 Tyrw. 584.

8. That the solicitor to the commission cannot purchase the bankrupt's property is a rule to be adhered to. Ex parte *Farley*, 3 Dea. & Ch. 110.

9. The admission of a solicitor under peculiar circumstances ordered to be enrolled *nunc pro tunc*. Ex parte *A—*, 3 Dea. & Ch. 417. S. P. ex parte *Tanner*, 3 Dea. & Ch. 10.

10. Creditors may petition to tax the solicitor's bill of costs, though paid, the assignees having been guilty of dereliction of duty in not filing the bill with the proceedings. Ex parte *Castle*, 1 Mont. & Ayr. 665.

See Costs, 9.

SPECIAL CASE.

1. General order as to preparation of. 1 Mont. & Ayr. *Appendix*.

2. The Court of Review cannot dispense with the appellant's signature to a special case. Ex parte *Robinson*, 2 Dea. & Ch. 583.

3. The determination of the judge as to the settlement of a special case is final. Ex parte *Low*, 1 Mont. & Ayr. 189.

4. It is not discretionary in the judges of the Court of Review to refuse a special case when the party is entitled to appeal. Ex parte *Hinton*, 2 Dea. & Ch. 407.

5. Quære, as to the obligation on the judges of the Court of Review to sign a special case? Ex parte *Hawley*, 3 Dea. & Ch. 234.

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6. It is imperative of the judges of the Court of Review to sign a special case. Ex parte *Turner*, 1 Mont. & Ayr. 368.

See APPEAL.

SPECIAL CASE FROM COMMISSIONER.

Special case sent from commissioner must be brought on upon petition. Ex parte *Johnston*, 1 Mont. & Ayr. 622.

SPECIFIC PERFORMANCE.

1. If the intended lessor and lessee both become bankrupt, and the assignees agree to take a lease, *semble* the Court have not jurisdiction to enforce specific performance. Ex parte *Lucas*, 1 Mont. & Ayr. 93. S. C. 3 Dea. & Ch. 144.

2. Specific performance decreed under the circumstances. Ex parte *Sidebotham*, 1 Mont. & Ayr. 655.

STAMP.

A joint and several promissory note was made for the repayment of a loan, and one of the party signs it some days after the party who borrowed the money: Held, that the note did not require an additional stamp, if the last signature were before the money was advanced, or if the promise to sign were made before the advance. Ex parte *White*, 2 Dea. & Ch. 384.

STANDING OVER.

See Costs, 11. 42.

STATUTE OF LIMITATIONS.

1. A debt barred by the statute of limitations will not support a commission. See ex parte *Nokes*, 1 Mont. & Ayr. 461, and *Middleton v. Mucklow*, 10 Bing. 401.

2. Statute of limitations not a bar in cases of fraud; so that assignees may petition to expunge a proof, and have the dividends returned, after six years, in a case of fraud. Ex parte *Bolton*, 1 Mont. & Ayr. 60.

3. Quære, Whether simple contract creditors be barred by the statute of limitations after a supersedeas. Per Sir George Rose. Ex parte *Davy*, 1 Mont. & Ayr. 300.

STATUTES.

See CONSTRUCTION.

STAYING ADVERTISEMENT IN THE GAZETTE.

1. The application to stay the advertisement in the Gazette will not be heard unless the proceedings be in Court, or, as it seems, unless there be a strong affidavit of solvency. Ex parte *Pownell*, 1 Mont. & Ayr. 116.

2. The Lord Chancellor will stay the insertion of the advertisement in the Gazette. Ex parte *Nokes*, 1 Mont. & Ayr. 461.

3. No principle more clear in the bankrupt law than that where

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a trader, against whom a commission had been issued, came before the Lord Chancellor, and swore that he owed no debt to the petitioning creditor, and had committed no act of bankruptcy, but that on the contrary he was perfectly solvent, and that he should be ruined if he was adjudged a bankrupt, and in the Gazette, the Chancellor was uniformly in the habit of suspending the advertisement. Per Sir G. Rose. *Ex parte Fletcher*, 2 Dea. & Ch. 329.

4. Where a trader swears he owes no debt to the petitioning creditor, and has committed no act of bankruptcy, and it appears that the fiat is fraudulent, the insertion of the advertisement in the Gazette will be stayed. *Ex parte Fletcher*, 2 Dea. & Ch. 327.

5. Insertion of the advertisement stayed by the Lord Chancellor. *Ex parte Keys*, 1 Mont. & Ayr.

6. The Court of Review will stay the insertion of the advertisement in the Gazette. *Ex parte Lavender*, 1 Mont. & Ayr. 699.

7. The advertisement in the Gazette will not be stayed to give effect to a composition; that is only done where the commission is disputed. *Re Hampden*, 2 Dea. & Ch. 209.

STAYING CERTIFICATE.

See CERTIFICATE, 9. 10.

STOPPAGE IN TRANSITU.

1. The legal right of a vendor to stop goods *in transitu* is determined by the indorsement of the bill of

lading to a third person. Per Denman, C. J. In re *Westzynthius*, 2 Neville & Manning, 660.

2. An equitable right of (*quasi*) stoppage *in transitu* remains in the vendor, notwithstanding an indorsement of the bill of lading by the vendee to a person who advances money on the security of such indorsement; but such right of the vendor is subject to the right of the indorser to be repaid his advances; and the vendor has an equity to require the indorser to repay himself out of other property of the vendee in his hands, as far as it will extend; and if the indorser apply the proceeds of the property so equitably stopped *in transitu* in payment of his debt, the vendor will have a lien upon the interest of the vendee in such other property. In re *Westzynthius*, 2 Neville & Manning, 645.

3. If a quantity of rum bonded in vaults in a warehouse at Liverpool be sold, and the purchaser accept bills for the amount, and the vendor negotiate the bills, and the invariable mode of delivering goods in warehouses at Liverpool is by handing delivery orders, but which the vendor refuse to give, except as to a small quantity, and the bills be at maturity dishonoured, the vendor is not divested of his right of stoppage *in transitu*, notwithstanding the vendee have resold the rums, and received the purchase money from the sub-vendee, who was permitted by the warehousemen, but without the knowledge of the original vendor, to gauge and cooper the casks in the warehouse, and mark them with his name. *Dixon v. Yates*, 2 Neville & Manning, 177. S. C. 5 Barn. & Adol. 313.

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SUBDIVISION COURT.

See JURISDICTION OF THE COURT OF REVIEW, 4. — COMMITTAL, 1.

SUITS BY ASSIGNEES, OR BANKRUPT.

*See ASSIGNEES, Suits by, 32. 33. —
BANKRUPT, SUITS BY.*

SUPERSEDEAS.

1. In cases of supersedeas the great seal has still a substantive power, independent of that on appeal. Ex parte *Keys*, 1 Mont. & Ayr. 226. S. C. 3 Dea. & Ch. 263.

2. If the bankrupt have tried the validity of the commission at law, and that with success, then he may demand the supersedeas. Per Sir G. Rose. Ex parte *Clarke*, 2 Dea. & Ch. 198.

3. A commission held under the circumstances not supersedeable, though there were not the requisites to support it, and there had been a verdict at law against it. Ex parte *Munk*, 1 Mont. & Ayr. 612.

Before Surrender.

4. The bankrupt's petition to supersede will not be heard till he have surrendered, though presented before the forty-second day, and heard before the enlarged time for surrender has expired. Ex parte *Drake*, 2 Dea. & Ch. 91. S. C. Mont. 486.

5. A petition to supersede for want of the requisites will not be heard before surrender, though the bankrupt be in America. Ex parte *Kirkman*, 1 Mont. & Ayr. 709. S. C. 3 Dea. & Ch. 451.

6. A petition to supersede a joint commission on consent of creditors will be dismissed as to any one of the bankrupts who has not surrendered, but ordered as to those who have. Ex parte *Knowlson*, 3 Dea. & Ch. 191.

7. A commission may be superseded, though the bankrupt has not surrendered, if he attended at a meeting, and became unable to surrender at the last meeting through illness. Ex parte *Thomas*, 3 Dea. & Ch. 234.

8. Where an action has been fairly tried, and the verdict is against the commission, and the bankrupt is abroad, the fiat may be superseded on the petition of the petitioning creditor, though the bankrupt has not surrendered. Ex parte *Foulger*, 1 Mont. & Ayr. 457.

9. Although the adjudication has been reversed, a creditor has no right to have the fiat annulled where the bankrupt has not surrendered, even on a petition presented before the forty-second day. Cross, J., dissentiente. Ex parte *Clarke*, 2 Dea. & Ch. 194. S. C. Mont. & Bli. 379.

Staying Actions.

10. Where a bankrupt petitions to supersede, and at the same time brings an action against the petitioning creditor to try the validity of the fiat, he must elect which remedy he will pursue. Ex parte *Drake*, 2 Dea. & Ch. 91.

11. A bankrupt petitioned to supersede, and at the same time brought an action; the Court refused to compel him to elect, but ordered the petition to stand over till the result of the action was ascertained. Ex parte *Chambers*, 2 Dea. & Ch. 372.

12. If bankrupt petition to supersede, having actions pending, he

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must elect. Per Sir George Rose. Ex parte *Davy*, 1 Mont. & Ayr. 299.

13. Where the bankrupt petitions to supersede, having commenced actions, he must undertake to stay them, and not to bring others without leave of the Court. Ex parte *Pownall*, 1 Mont. & Ayr. 314.

14. The bankrupt may petition to supersede, without undertaking not to bring actions. Ex parte *Daly*, 1 Mont. & Ayr. 343.

Copies of Depositions.

15. When the bankrupt petitions to annul the fiat (a), on the ground that he has not committed an act of bankruptcy, the Court will order him to be furnished with copies of the depositions relating to the act of bankruptcy. Ex parte *Smith*, 3 Dea. & Ch. 101.

Before Time for opening has expired.

16. Where the petitioning creditor becomes bankrupt before the fourteen days for opening the fiat have elapsed, the Court will not supersede on the petition of another creditor who is prepared to issue a new fiat. Ex parte *Smith*, 1 Mont. & Ayr. 78. S. C. 3 Dea. & Ch. 309.

17. The petitioning creditor left the country, and it was apprehended the bankrupt would follow him. The fourteen days for opening the fiat had not elapsed; a creditor petitioned to supersede, undertaking to issue a new fiat, but the Court would not interfere. Ex parte *Medley*, 1 Mont. & Ayr. 79.

18. If a petitioning creditor be too poor to go on with the fiat, it may be superseded before the four-

teen days for opening have expired, he consenting. Ex parte *Segre*, 1 Mont. & Ayr. 79, in note.

Assignees petitioning.

19. Nothing will be looked at with more jealousy than assignees coming to supersede. Per Sir G. Rose. Ex parte *Burnell*, 1 Mont. & Ayr. 44.

Misdescription.

20. Rule as to superseding fiat for misdescription of the bankrupt. Ex parte *Mills*, 1 Mont. & Ayr. 310.

21. A bankrupt, who had lived in Brompton, and had a room in the custom-house, four days before the issuing the fiat he took lodgings in Arundel Street, of which place he was described in the fiat. It was superseded for misdescription. Ex parte *Tanner*, 2 Dea. & Ch. 563.

22. A commission issued against a trader by the name of "Wicks," under which he traded, though "Knox" was his real name. Two years afterwards, and before he had passed his last examination, a fiat issued against him by his right name. The commission was preferred to the fiat. Ex parte *Sambourne*, 2 Dea. & Ch. 22.

Issued for improper Purpose.

23. The uniform rule I take to be this: if a commission is issued for a purpose wholly foreign to the subject of the bankrupt laws, such as to stay an action, determine a lease, or dissolve a partnership, it shall not be permitted to stand. Per Lord Chancellor. Ex parte *Christie*, 2 Dea. & Ch. 505. S. C. Mont. & Bli. 351.

24. A commission issued by one partner, solely so dissolve the partnership, is supersedable. Ex parte

(a) Qu. Reverse the adjudication?

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Christie, 2 Dea. & Ch. 465. S. C. Mont. & Bli. 314. Confirmed on appeal, ex parte *Christie*, 2 Dea. & Ch. 488. S. C. Mont. & Bli. 329.

Concert.

25. A concerted bankruptcy may be superseded, if application be made promptly. Ex parte *Mills*, 1 Mont. & Ayr. 311.

26. On a petition by creditors to supersede for fraudulent concert between the petitioning creditor and the bankrupt, the bankrupt's affidavit is admissible to prove the fraud. Ex parte *Arnsby*, 3 Dea. & Ch. 10.

Compromise.

27. Where petitioning creditor allows the time for opening a fiat to expire, and it was issued to effect a compromise, and not with a *bond fide* intention of working it, and a second fiat is issued by another creditor, under Lord Loughborough's general order, the Court will not supersede the second fiat merely because the creditor was party to the intended compromise under the first fiat, unless clearly for the advantage of the general creditors that the first fiat should stand and the second fiat be superseded. Ex parte *Anjer*, 2 Dea. & Ch. 67.

28. After a fiat had issued the bankrupt made proposals to prevent its prosecution; to which proposals the solicitor for one of the creditors promises to give an answer at a certain time, on the following day (the 16th after the date of the fiat), but before that time arrives this creditor struck a second docket for non-prosecution of the first: Held, that this was a breach of faith, and a petition by this creditor to annul the first fiat was dismissed with costs. Ex parte *Baker*, 2 Dea. & Ch. 363.

29. Two creditors persuaded a bankrupt to execute an assignment to them for the benefit of his creditors, and then issued a fiat setting up the assignment as the act of bankruptcy. They then seized his property without taking any proceedings under the fiat. On the application of a *bond fide* creditor this fiat was ordered to be annulled and a new one issued. Ex parte *Mucklow*, 3 Dea. & Ch. 25.

Costs.

30. Where a fiat is annulled for want of the requisites it is always at the costs of the petitioning creditor. Ex parte *Fletcher*, 2 Dea. & Ch. 374. S. P. ex parte *Tanner*, 2 Dea. & Ch. 572. S. C. Mont. & Bli. 393.

31. In June a fiat issued on a solicitor's bill of costs soon after he was discharged under the Insolvent Debtor's Act, having inserted the amount of this bill in his schedule as an admitted debt; in December he petitioned to tax this bill, avowedly to reduce it below 100*l.*, in order to supersede for want of a good petitioning creditor's debt: Held, the length of time and admission of the debt estopped him. Sir J. Cross, dissentiente. Ex parte *Gingell*, 2 Dea. & Ch. 546.

32. The Court of Exchequer will not grant a rule for taxation of an attorney's bill of costs at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make the attorney a bad petitioning creditor. *Chutterbuck v. Nicholls*, 2 Neville & Manning, 209.

Against Infant.

33. A fiat against a minor superseded with costs. Ex parte *Hehir*, 3 Dea. & Ch. 107.

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Lapse of Time.

34. After twenty years, and the death of the petitioning creditor and of the bankrupt, the Court will not supersede a commission fraudulently issued, if the delay be not accounted for. Ex parte *Grainger*, 2 Dea. & Ch. 459.

Certificate.

35. A petition to supersede by a creditor, presented a year after the bankrupt has obtained his certificate, cannot be heard unless the delay be accounted for. Ex parte *Wyatt*, 1 Mont. & Ayr. 405.

36. A certificate under a fraudulent commission is no protection against a supersedeas. Ex parte *Wyatt*, 1 Mont. & Ayr. 407.

Second Fiat, and no Certificate.

37. It is not of course to supersede a second commission against an uncertificated bankrupt, on the application of the assignees, &c., under the first. Ex parte *Devas*, 1 Mont. & Ayr. 420.

General.

38. If, on a petition to supersede the Lord Chancellor order a trial, which is in favour of the commission, the Court of Review cannot supersede on a petition for costs and a cross petition for a new trial, both brought on by way of further directions. Ex parte *Keys*, 1 Mont. & Ayr. 226. S. C. 3 Dea. & Ch. 263. reversing ex parte *Harwood*, 3 Dea. & Ch. 252.

39. A petition prayed that the Court of Review would reverse an order of the Lord Chancellor annulling a fiat. It was objected that the Court had no power so to do: the objection was over-ruled; for

though the Court cannot actually rescind such order, it can intimate its opinion to the Lord Chancellor, who will act accordingly. Ex parte *Anjer*, 2 Dea. & Ch. 67.

40. *Semble*, if a deposition and proof refer to an account as annexed, which is not produced, the commission is supersedeable. Ex parte *Clarke*, 2 Dea. & Ch. 86.

41. If a landlord distrain, and the assignees promise that if he will withdraw the person put in possession, the amount of the rent shall be paid out of the produce of the sale of the effects, it is an absolute promise, and the assignees are liable, although the fiat be afterwards superseded. *Stephens v. Pell*, 4 Tyrw. 6.

42. The objection that the petitioner, in a petition to supersede, is not a creditor, is not strictly preliminary. Ex parte *Wyatt*, 1 Mont. & Ayr. 406.

See ACQUIESCENCE—ASSIGNEES, 5.
— EVIDENCE — NEW TRIAL —
SECOND COMMISSION.

SUPERSEDEAS BY CONSENT.

1. Commission will not be superseded on consent, till the bankrupt has surrendered. Ex parte *Knowlson*, 3 Dea. & Ch. 191.

2. The Court will supersede where all the creditors consent and the bankrupt has paid twenty shillings in the pound, though his examination has been adjourned *sine die*. Ex parte *Gudge*, 1 Mont. & Ayr. 341.

3. Court will not supersede a commission thirty years old, unless all the creditors consent. Ex parte *Lupton*, 2 Dea. & Ch. 136.

4. A supersedeas by consent must have the consent of all the assignees

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of a bankrupt creditor. Re *Leader*, 1 Mont. & Ayr. 244. S. C. reported the other way, 3 Dea. & Ch. 469.

5. On a supersedeas with consent, one creditor was abroad, and had given an authority (not quite formal) to consent. Supersedeas ordered on depositing the amount of his debt. Ex parte *Hamilton*, 2 Dea. & Ch. 519. S. P. re *Brecknell*, 1 Mont. & Ayr. 80.

6. Where all creditors consent to supersedeas except A., who is abroad, and B. holds a general power of attorney from A.: Held, B.'s consent was sufficient. Ex parte *Hamilton*, 2 Dea. & Ch. 139.

7. A creditor gave a power of attorney in general terms, but without any express power to consent to a supersedeas, the signature of the creditor himself being easily attainable: Held, that his own signature ought to be procured. Re *Sampson*, 3 Dea. & Ch. 198.

8. A supersedeas was applied for, upon consent of all the creditors but one, who died insolvent, and no administration taken out, but his son signed the consent: Held, the supersedeas could not issue without a limited administration for this purpose. Re *Hall*, 1 Mont. & Ayr. 54. S. C. 3 Dea. & Ch. 449.

9. Petition for supersedeas with consent of creditors. One dies insolvent after proof, and his executor does not prove the will: Held, that his brother-in-law might sign the consent. Another creditor, who had proved a debt as the continuing partner of a firm that had dissolved their partnership, died before his retiring partner: Held, that his executrix might sign the consent. Ex parte *Leader*, 3 Dea. & Ch. 469.

10. On a supersedeas by consent, the consent of the official assignee is not necessary. Ex parte *Parker*,

3 Dea. & Ch. 112. S. C. Nom. ex parte *Barker*, Mont. & Bli. 412.

11. If the sole assignee be a creditor, and sign the consent to the supersedeas, he need not be served with the petition to supersede. Ex parte *Ramsay*, 1 Mont. & Ayr. 708.

12. On a petition to supersede with consent of creditors, the petitioner must produce the certificate of the commissioners of such consent, and the petition must be set down for hearing. Ex parte *Croker*, 3 Dea. & Ch. 9.

SURRENDER.

1. Where a bankrupt omitted to surrender, in consequence of a negotiation pending for a supersedeas, the Court appointed a fresh meeting to take his surrender. Ex parte *Jeffreys*, 2 Dea. & Ch. 86.

2. Where, from unavoidable accident, the commissioners are prevented from meeting to take the bankrupt's last examination, the Court will appoint another day for that purpose. Ex parte *Wilson*, 2 Dea. & Ch. 388.

3. Where the last examination of the bankrupt has been adjourned *sine die*, the Court will not order the commissioners to appoint a time, unless misconduct be charged against them, or the bankrupt can show serious injury will accrue. Ex parte *Perkins*, 1 Mont. & Ayr. 524.

4. Where a petition to supersede will not be heard till the bankrupt has surrendered, see ex parte *Drake*, 2 Dea. & Ch. S. C. Mont. 486; ex parte *Kirkman*, 1 Mont. & Ayr. S. C. 3 Dea. & Ch. 450; ex parte *Knoulson*, 3 Dea. & Ch. 191.

5. Where a petition to supersede will be heard before the bankrupt

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has surrendered, see *ex parte Thomas*, 3 Dea. & Ch. 234; *ex parte Foulger*, 1 Mont. & Ayr. 457.

TAXATION.

1. Costs of petitions, &c. in the Court of Review, are taxed by a registrar of that court. *Ex parte Reay*, 2 Dea. & Ch. 586.

2. Not necessary to obtain leave to except to the registrar's certificate of taxation. *Ex parte Crockwell*, 1 Mont. & Ayr. 379, *in note*.

3. The petitioning creditor's bill may be taxed by an officer of the Court of Review after allowance by the commissioners. *Ex parte Hattersley*, 2 Dea. & Ch. 373.

4. When several bills are taxed, the one-sixth is calculated on the aggregate amount. *Ex parte Barrett*, 1 Mont. & Ayr. 447.

5. After the lapse of five years, a messenger's bill cannot be taxed without a charge of fraud lately discovered. *Ex parte Willment*, 1 Mont. & Ayr. 45. S. C. 3 Dea. & Ch. 364.

6. Where the solicitor's bill has been paid, but not taxed by the commissioner, it will be taxed, on application of the assignees, without any special reason being assigned for the taxation. *Ex parte Pickering*, 2 Dea. & Ch. 387.

7. Quære, Whether the solicitor's bill, up to the choice of assignees, must be taxed by the commissioners before the solicitor can sue upon it, if the assignees waive the objection? *Barrow v. Husband*, 1 Nev. & Man. 730.

8. The amount of a solicitor's bill was inserted by the client in his schedule under the Insolvent Debtors Act; the attorney afterwards took out a commission on this debt: the client cannot have this taxed,

avowedly to reduce it below 100*l*., and supersede for want of a good petitioning creditor's debt. *Ex parte Gingell*, 2 Dea. & Ch. 546.

9. The Court of Exchequer will not grant a rule for taxing an attorney's bill of costs at the instance of a third party, who makes the application simply for the collateral purpose of reducing the bill so low as to make the attorney a bad petitioning creditor. *Clutterbuck v. Nicholls*, 2 Nev. & Man. 209.

10. Creditors may petition to tax the solicitor's bill of costs, though paid, the assignees having been guilty of dereliction of duty in not filing the bills with the proceedings. *Ex parte Castle*, 1 Mont. & Ayr. 665.

See COSTS OF TAXATION, 43.

TENDER.

See PETITIONING CREDITOR'S DEBT, 5.

TRADING.

1. A fraudulent trading, got up to make a person a bankrupt, will not support a fiat. *Ex parte Dart*, 2 Dea. & Ch. 543.

2. If a livery stable keeper buy hay, straw, and oats, and supply them to the horses standing in his mews, or sell them to any person, as is done in all livery stables, it is a trading to support a commission. *Cannon v. Deneu*, 10 Bing. 292. S. C. 3 Moore & Scott, 761.

TRUST ESTATES.

1. Do not vest in the assignees. *Ex parte Painter*, 2 Dea. & Ch. 584.

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2. When a trustee becomes bankrupt, the Court may appoint a new one without a reference to the master. Ex parte *Buffery*, 2 Dea. & Ch. 576.

3. On a mortgage to a trustee for the mortgage, with a trust for sale, and the trustee becomes bankrupt, the mortgagor should join in the application for a new trustee. Ex parte *Orgill*, 2 Dea. & Ch. 413.

4. A surviving trustee having become bankrupt, and outlawed, the Court ordered the assignees to transfer the trust stock to new trustees. Ex parte ———, 3 Dea. & Ch. 24.

5. The Court will not take a trust deed out of the hands of the bankrupt's trustees. Ex parte *Holder*, 3 Dea. & Ch. 276.

6. It is no defence, at law, to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the defendants (the lessees) have performed their covenants with the assignee of the *cestui que trust*. *Britten v. Britten*, 4 Tyrw. 473.

TRUSTEES.

1. The Court will not take a trust deed out of the hands of the bankrupt's trustees. Ex parte *Holder*, 3 Dea. & Ch. 276.

Bankruptcy of.

2. Bankrupt trustee removed, and ordered to convey to new trustees. Ex parte *Painter*, 2 Dea. & Ch. 584.

UNCERTIFICATED BANKRUPT.

An uncertificated bankrupt may maintain an action for the price of

goods sold by him after the issuing of the commission, if his assignees do not interfere. *Hayllar v. Sherwood*, 2 Nev. & Man. 401.

UNCLAIMED DIVIDENDS.

1. Quære, Whether on distributing unclaimed dividends any further assets should at the same time be set apart on account of the same proof? Ex parte *Mowbray*, 1 Mont. & Ayr. 300.

2. The Court will not order dividends to be distributed as unclaimed where no dividend had been declared till twenty-one years after the commission issued, unless the creditors had ample notice that such dividends had been declared. Ex parte *Fedden*, 2 Dea. & Ch. 379.

3. Semble, that the unclaimed dividends of joint creditors can only go to the joint creditors, and those of separate creditors to the separate creditors. Ex parte *Fedden*, 2 Dea. & Ch. 379.

4. Unclaimed dividends can only be ordered to be divided among all the other creditors generally, and not among a particular class of creditors. Ex parte *Lackington*, 3 Dea. & Ch. 331.

UNDERTAKING.

"On behalf of J. P. I hereby give you notice, that, &c. and on such behalf as aforesaid I give you this further notice, that *I am* ready and hereby offer to allow and pay the costs of," &c.: Held a personal undertaking by the solicitor. Ex parte *Bentley*, 2 Dea. & Ch. 578.

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USURY.

1. Where sums of money advanced and to be advanced are secured by deed, and any of the dealings then contemplated by the parties are tainted with usury, the deed is wholly void as a security, although the legal debt is not impeached. Ex parte *Millington*, 3 Dea. & Ch. 298.

2. A. employs B. as a calico printer, and before any thing is due for printing, A. from time to time advances B. various sums of money, charging him besides interest, with 14 10s. per cent. as a trade premium, which it was customary for persons in the same trade to take under the like circumstances; A. was in the habit of paying debts owing by B. to other persons before they became due, when A. deducted the usual discount, but charged B. with the full amount of the debt, besides interest and the trade premium above mentioned: Semble, that both these modes of dealing were usurious; they were, however, at least of so suspicious a nature, that the Court declined to make an order for the sale of the property under the deed, but directed an action of ejectment to be brought by A. against his assignees. Ex parte *Millington*, 3 Dea. & Ch. 298.

3. A charge of 10s. per cent. for commission, besides the legal interest on discount of bills, is not usurious, if *bond fide* for trouble and expence incurred by the lender, although he may not be a banker or a person engaged in trade, and although the money lent is his own. Ex parte *Gwynn*, 2 Dea. & Ch. 12.

4. A bill broker, in order to get a bill discounted at four per cent., takes upon himself the responsibility of indorser, and charges his

principal five per cent. discount, which is the lowest sum at which he could have done the business except for his indorsement: Held, that although he also charged 10s. per cent. for his trouble, &c. it was not usury. Ex parte *Goss*, 2 Dea. & Ch. 240.

5. A banker lent a customer 4,000*l.* at five per cent., and it was agreed that a balance of 1,000*l.* at least should always be left: Held, under the circumstances of the case, not usurious. Ex parte *Patrick*, 1 Mont. & Ayr. 385.

6. A sum was advanced to a person to commence trade; the lender was to have 5*l.* per cent. and one-eighth of the profits: Held not usurious. Ex parte *Nolley*, 1 Mont. & Ayr. 46.

VACATION OF THE ASSIGNMENT.

See ASSIGNEES, 20.

VALID PAYMENTS.

1. A payment on a sale of goods is protected by section 82 of 6 Geo. 4. c. 16. Per Tindal, C. J. *Cannon v. Denew*, 10 Bing. 296.

2. A loan of money on a pledge is not protected by section 82 of 6 Geo. 4. c. 16. *Cannon v. Denew*, 10 Bing. 296.

3. If a trader buy goods, to be paid for at a future day, but which are not to be removed until payment or security given, and on the day fixed for payment the trader, being unable to pay the purchase money of 1,400*l.*, delivered 400*l.* in cash, and two undue bills for 500*l.* each, to his father, for the purpose of

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paying for the goods, and the father discount the bills, and pay the amount to the vendor by a check upon his banker, and a commission issue against the trader upon an antecedent act of bankruptcy, the payment is, as to the vendor, protected by section 82 of 6 Geo. 4. c. 16., and the assignees are not entitled to recover the amount from the father. *Shaw v. Balley*, 1 N. & M. 751. S. C. 4 B. & Adol. 809.

See RELATION.

VARYING MINUTES.

The Court will not vary the minutes of an order on the application of persons not parties to or bound by it. Ex parte *De Begnis*, 1 Mont. & Ayr. 279.

VIVÂ VOCE EXAMINATIONS.

1. A creditor of the bankrupt is not a good witness on a *vivâ voce* examination on a petition to supersede. Ex parte *Lavender*, 1 Mont. & Ayr. 699.

2. An application to examine *vivâ voce* should be made before the petition is heard on affidavit. Ex parte *Baldwin*, 1 Mont. & Ayr. 617. Correcting ex parte *Arnsby*, 2 Dea. & Ch. 120. S.P. *Anon.* 2 Dea. & Ch. 140.

3. In the course of hearing a petition on affidavit, a witness cannot be examined *vivâ voce* without any previous order of the Court. Ex parte *Baldock*, 2 Dea. & Ch. 60.

4. It seems a party may depose *vivâ voce* to having been served. Ex parte *Tull*, 1 Mont. & Ayr. 225.

5. Where a petitioner's affidavit does not carry his case far enough, the hearing will not be adjourned to enable him to attend to depose *vivâ voce*; he should be in attendance if his examination were likely to be necessary. Ex parte *Dickenson*, 2 Dea. & Ch. 520.

6. On a petition by the owner for property alleged to have been in the reputed ownership, the bankrupt is not a competent witness on a *vivâ voce* examination. Ex parte *Higgins*, 2 Dea. & Ch. 269.

7. Where a petition stands over to have a *vivâ voce* examination, that side begins on which the affirmative lies. Ex parte *Daly*, 1 Mont. & Ayr. 384.

WARRANT OF COMMITMENT.

See COMMITTAL.

WAGES.

See ALLOWANCE TO CLERKS.

WILFUL DEFAULT.

The commissioners have no power under the 106th section of 6 Geo. 4. c. 16. to charge the assignees with what, but for their wilful default, they might have received. Ex parte *Keys*, 2 Dea. & Ch. 633.

ERRATA.

PAGE 5, line 2, for *Jackson v. Barron* read *Tucker v. Barron*.

Page 26, line 6, for *Wright v. Pullen* read *Wrightson v. Pullan*.

Page 26, line 17, for 1 *East*, 308. read 368.

Page 32, line 7, for 3 *Merr.* 275. read 279.

Page 62, in note, for 9 *Ves.* 468. read 19 *Ves.* 468, and add S. C. 2 *Rose*, 245.

Page 65, line 18 of marginal note, insert "made" between "exchange" and "by."

Page 93, line 10 from bottom, for *Geldart* read *Stinton*.

Page 345, line 1 both of text and of marginal note, for *ex parte Turner* read *Cotesworth*.

Page 405, line 9 from bottom, for "petitioning creditor" read "petitioner."

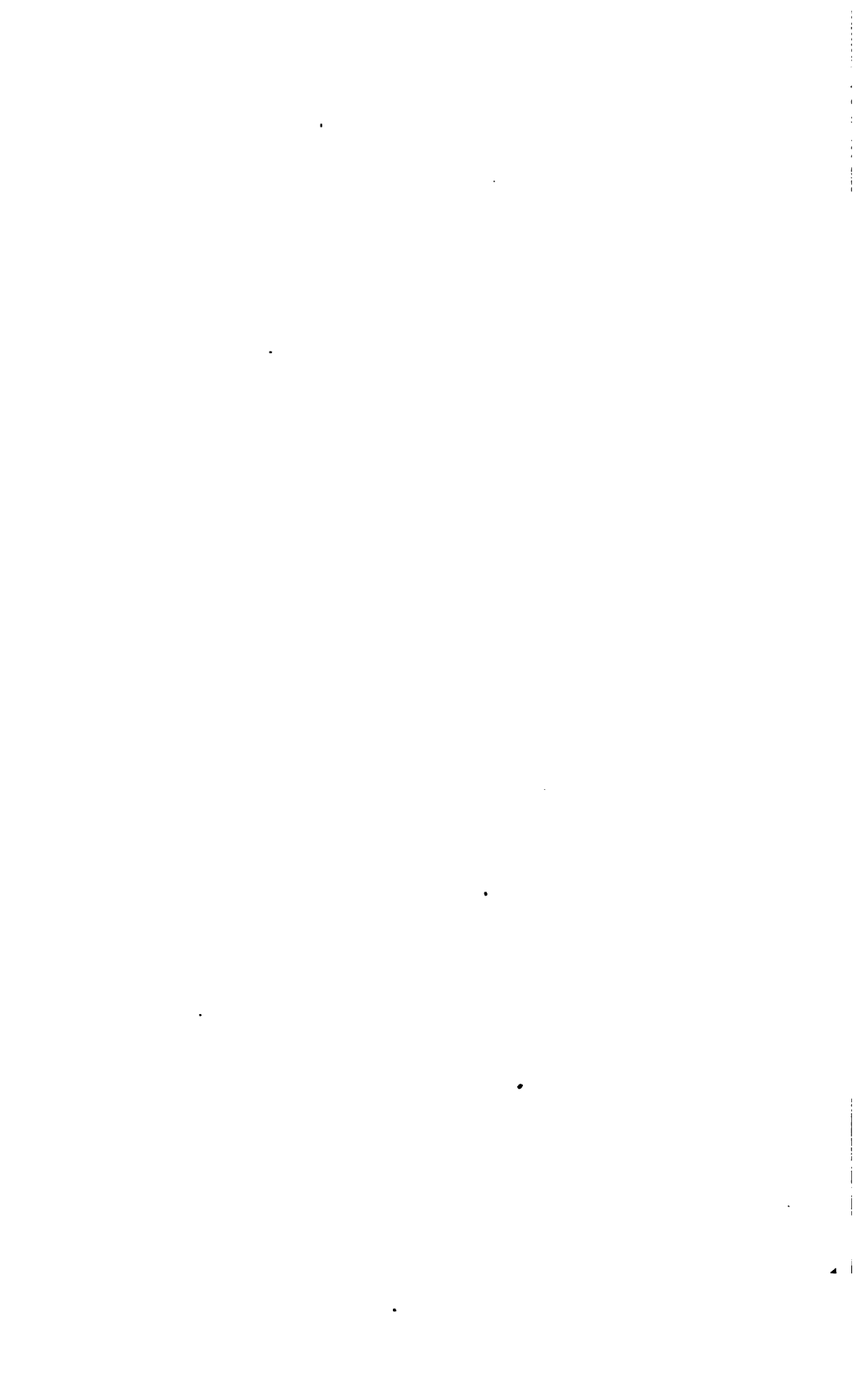
Page 417, last line but one of note, for *Eldon* read *Erskine*, and for "April 15, 1815" read "December 29, 1806."

Page 421, line 11, for "1826" read "1823."

Page 427, line 14, for 2 *Rose*, 136. read 1 *Rose*, 134.

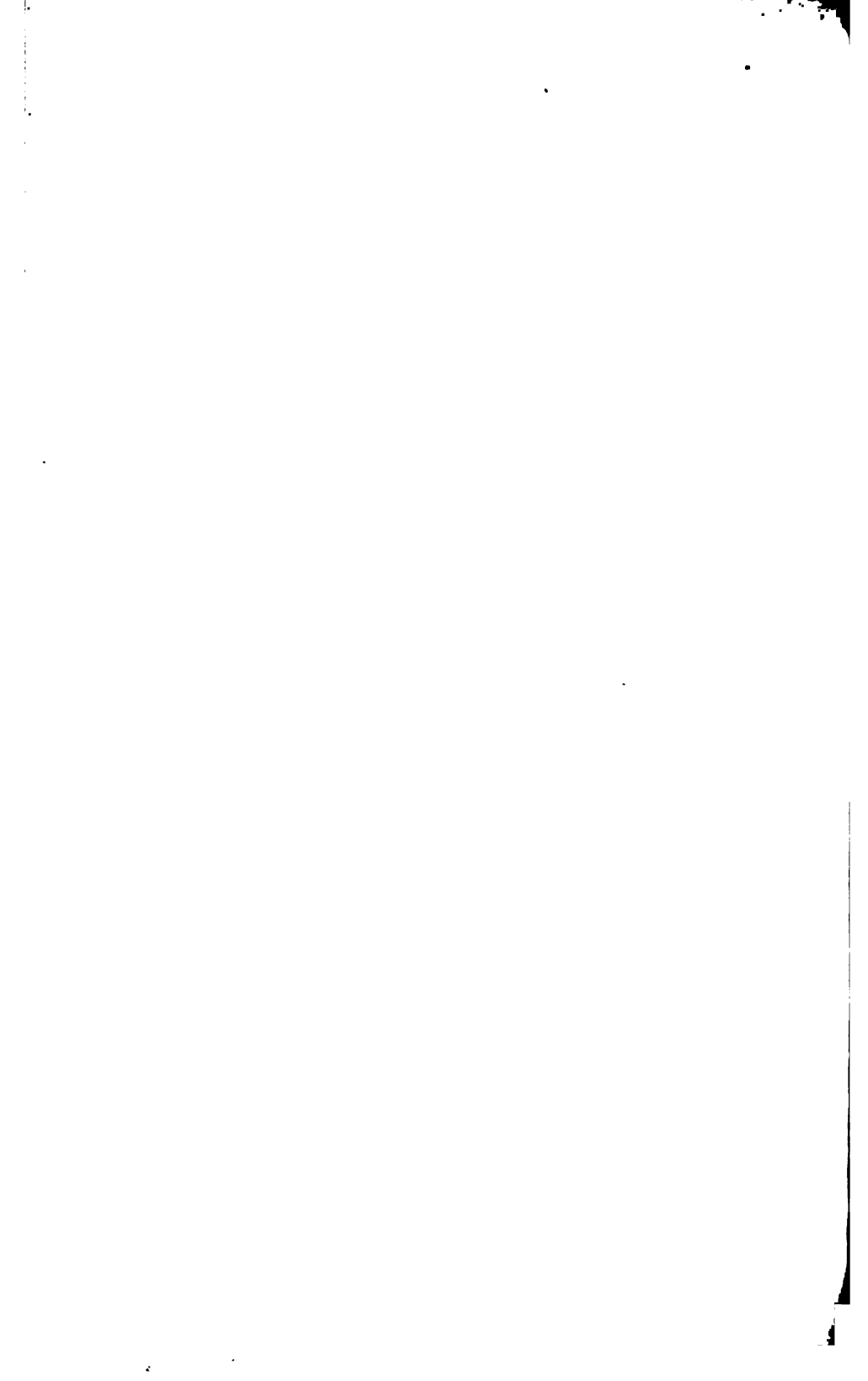
Page 481, marginal note, for "though no registry of this deposit be made" read "though the registry of this deposit contain no list of slaves."

Page 703, the marginal note refers to line 9: insert (*a*) after *Williams* and *Stephens*, and dele (*a*) in line 23.









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